Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1404

IRA M. BALL, ET AL.,

Petitioners,

-vs-

HUGH L. CAREY, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF NEW YORK, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT.

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February 16, 1979

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

IRA M. BALL, Individually and as a member and Chairman of the New York State Bingo Control Commission, DR. CARMINE G. FREDA, LEO A. PICKNEY and HAROLD R. MOSKOVIT, Individually and as members of said Commission, Suing on Behalf of Themselves, Staff Members and Employees of the State Bingo Control Commission; THOMAS P. LYNCH and JOHN TEDESCO, Individually and as Staff Members of said Commission, on behalf of themselves and other employees of said Commission; MARJORIE M. JENSEN, Individually and as confidential Secretary to said Commission; NORMAN HAGADORN, ALLEN LENRFELD, WILLIAM J. KELLY, EDWARD T. KELLY, FLOYD BURD, LLOYD WHITNEY, LEWIS W. SMITH, WILLIAM KISSAM, WILLIAM SIMMONS, RICHARD SOULE, EDWARD GREEN, Individually and as Members of the Investigative Staff of said Commission, on behalf of all other investigators and employees of said Commission,

Petitioners,

-vs-

HUGH L. CAREY, Individually and as Governor of the State of New York; DAVID W. BURKE, Individually and as Secretary to the Governor; MARIO M. CUOMO, Individually and as Secretary of State; DONALD A. CROTEAU, Individually and as the Administrative Director of Department of State; PETER GOLDMARK, Individually and as Director of Budget; JOHN W. VAN LAAK, Individually and as Chief Budget Examiner; BERTRAM D. SARAFAN, Individually and as Chairman of the Racing and Wagering Board; EUGENE J. KEOGH and JOSEPH H. BOYD, JR., Individually and as Members of the State Racing and Wagering Board; BERNARD GOLAR, Individually and as acting Director of Bingo, JOHN DAILEY, Individually and as Counsel, and MICHAEL R. GARDINEER, Individually and as Administrative Officer, all as Staff Members of the Racing and Wagering Board; ARTHUR LEVITT, Controller of the State of New York; ERSA POSTON, President of the Civil Service Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT.

IRA M. BALL, one of the Petitioners herein, prays that a Writ of Certiorari

be issued to review the Decision and Order of the Appellate Division of the Supreme Court, Third Department, of the State of New York, entered in the above-entitled case on July 10, 1978 and the judgment entered thereon.

OPINIONS BELOW.

This Court is being asked to review the Opinion of the Appellate Division of the Supreme Court of the State of New York, Third Department, affirming the dismissal of the Petitioners' Complaint. That Court's Opinion is reported at 64 A.D. 2d 723, 407 N.Y.S. 2d 76 and is printed in Appendix A,* pgs. A-1 - A-4. Judgments were entered upon said Order

* The Appendicies herein will be filed with this Court under separate cover.

and they are printed in Appendix A, pgs. A-5 - A-11.

Petitioners sought to appeal said Decision directly to the Court of Appeals of the State of New York as a matter of right but Respondents' motion to dismiss that appeal was granted on September 26, 1978 on the ground that "no substantial constitutional question was directly involved." The Court's Memorandum is reported in 45 N.Y. 2d 837 and printed in Appendix A along with the Order of that Court at pgs. A-12 - A-14.

Petitioners thereafter moved for leave to appeal to the Court of Appeals of the State of New York. The motion was denied on December 6, 1978 with a Memorandum not yet reported. The Memorandum is printed in Appendix A, pg. A-15. The Order of

that Court is printed in Appendix A, pgs. A-15 - A-16. The Judgment entered thereon is printed in Appendix A, pgs. A-17 - A-18.

The Opinion of the Special Term of the Supreme Court, Albany County, (Conway, J.) which dismissed the Plaintiffs' Complaint, not reported, is printed in Appendix B, pgs. B-1 - B-9. The Order of said Court is printed in Appendix B, pgs. B-10 - B-14. In the same Opinion and Order, Special Term also denied Petitioners' motion to add parties Plaintiff. Thereafter Special Term denied Petitioners' motion for reargument, without opinion. The Order is printed in Appendix B, pgs. B-15 - B-16.

The Opinion of the Special Term of the Supreme Court, State of New York, denying Petitioners' Motion for a Preliminary Injunction, dated March 23, 1976, is

reported at 85 Misc. 2d 1052, 381 N.Y.S. 2d 651 and is printed at Appendix C, pgs. C-1 - C-6. The Order of said Special Term (Casey, J.), dated April 13, 1976, is printed in Appendix C, pgs. C-7 - C-10.

Mr. Justice Casey's Order denying Petitioners' motion for reargument or renewal of the motion for a preliminary injunction was denied without opinion by Order dated May 14, 1976, printed in Appendix C, pgs. C-11 - C-14.

Closely Related Decisions

Both Special Term Justices herein who (1) denied a preliminary injunction (Appendix C, pgs. C-1 - C-6) and (2) dismissed Petitioners' Complaint for failure to state a cause of action (Appendix B, pgs. B-1 - B-9), specifically stated

their Decision to be contrary to the decision of the New York Court of Claims in Ball v. State, 83 Misc. 2d 903, 373 N.Y.S. 2d 761. The Court of Claims judgment held that the New York State Bingo Control Commission had not been abolished by the enactment of the 1975-76 State Budget. It was affirmed by both the Appellate Division, Third Department, in 52 A.D. 2d 47, 382 N.Y.S. 2d 835 and the Court of Appeals in 41 N.Y. 2d 617, 394 N.Y.S. 2d 597. The Court of Appeals Opinion is attached as Appendix D, pgs. D-1 - D-24. The Appellate Division Decision is attached as Appendix D, pgs. D-25- D-37.

Another closely connected case also cited by both Special Term Justices herein to sustain their Decision on said

motions is Church of the Ascension v. New York State Racing & Wagering Board. The Special Term Decision therein was not reported and was reversed in 55 A.D. 2d 874, 390 N.Y.S. 2d 113, which reversal was in turn affirmed by the New York State Court of Appeals on December 20, 1978, not yet reported but a copy of the Court's Opinion is printed as Appendix E, pgs. E-1 - E-2. This case proves the usurpation by Respondents of the Petitioners' offices and positions as alleged in the "SECOND CAUSE OF ACTION" of the Petitioners' Complaint (37-44)* particularly paragraph "21.B." (41-42).

* Figures in parenthesis refer to the Record on Appeal to the Appellate Division, Third Department, a copy of which is to be filed with this Petition.

JURISDICTION.

The Order of the Court of Appeals denying leave to appeal the Appellate Division Decision to that Court (Appendix A, pgs. A-15 - A-16), was entered on December 6, 1978. A final judgment dismissing Petitioners' Complaint on the merits was entered in the Albany County Clerk's Office on January 9, 1979 and is printed in Appendix A, pgs. A-17-18. The jurisdiction of the Supreme Court is invoked under 28 USCA, §1257(3). See: Southern Elect. Co. v. Stoddard, 269 U.S. 186, 70 L Ed. 227; McMaster v. Gould, 276 U.S. 284, 72 L Ed. 574, 7 L Ed. 2d 1025 at 1132-1134.

QUESTIONS PRESENTED.

1. Are the Governor of the State of New York and the other Respondent members

of the Executive Department of the State who are named in the title to this action, all of whom are sued personally as individuals, "absolutely immune from liability for the (intentional) tortious conduct" attributed to them in the Petitioners' Complaint, where said intentional tortious conduct involved the wrongful discharge of the Petitioners, some of whom had permanent civil service status and others of whom held unexpired terms as appointed State officers, where said action was taken without any authority and the action was beyond the scope of their constitutional and statutory authority?

2. Do the Respondent New York State officials specified in the title to this

action, who are sued personally and as individuals and not as State officials, have "absolute immunity" from personal liability for damages suffered by the Petitioner State officers and permanent civil service employees, all of whom have been deprived of their employment and compensation therefore by reason of the illegal and unlawful termination of their employment (1) without due process of law and (2) in violation of their rights of equal protection under the law, afforded them by §§6 and 11 of Article 1 and Article 5, §6 (civil service Petitioners only) of the New York State Constitution and the Fourteenth Amendment to the United States Constitution?

3. Did the Petitioner State officer

members of the New York State Bingo Control Commission have "standing to raise the (constitutional) issue" on behalf of themselves and the licensees of said Commission, that said eleemosynary licensees were being forced pay an illegal and unconstitutional "excise tax", in the form of a license fee, for the right to conduct bingo games in the State of New York, in derogation of the Fourteenth Amendment to the United States Constitution and Article 1, §11 of the New York State Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

UNITED STATES CONSTITUTION, Fourteenth Amendment, §1:

"All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW YORK STATE CONSTITUTION, Article 1, §6:

"No person shall be deprived of life, liberty or property without due process of law."

NEW YORK STATE CONSTITUTION, Article 1, §11:

"No person shall be denied the equal protection of the law of this state or any

subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

NEW YORK CIVIL SERVICE LAW, §75:

"Removal and other disciplinary action. A person described in paragraph (a), or paragraph (b), or paragraph (c), or paragraph (d) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(a) A person holding a position by

permanent appointment in the competitive class of the classified civil service, or * * *."

§ 433. Commission created; personnel

1. There is hereby created in the department of state a state bingo control commission, which shall consist of a chairman and four other members, all of whom shall be citizens and residents of the state, and not more than three members of which shall belong to the same political party.

2. No member, officer, or employee of the commission shall

(a) hold any other public office;

(b) be employed by or have any pecuniary interest in any firm or corporation owning or having any interest in premises used for the conduct of bingo games on a commercial rental basis or any firm or corporation engaged directly or indirectly in the manufacture, distribution or sale of supplies and equipment for bingo, or be related in the first degree to, or be the spouse of, any person so employed;

(c) be an officer or director of any organization licensed to play bingo;

(d) engage in private employment or in a profession or business which shall interfere or conflict or in any way tend to interfere or conflict with the performance of his duty as member, officer or employee of the commission, nor shall any such member, officer or employee engage in any business or transaction or professional activity or incur any obligation of any nature which is in conflict, or which in any way tends to conflict, with the proper discharge of his official duties.

3. Each member of the commission, including the chairman, shall be appointed by the governor, by and with the advice and consent of the senate, for five years, provided, however, that of the members first appointed, two shall be appointed for terms of

two years and two for three years, from the effective date of this amendment, with the chairman appointed for five years from such date. Their successors shall be appointed for terms of five years.

4. Any member of the commission may be removed by the governor for cause after an opportunity to be heard. A statement of the cause of his removal shall be filed by the governor in the office of the secretary of state.

STATEMENT OF THE CASE.

The Petitioners seek to recover damages from the Respondents, who are sued as individuals, for their intentional malicious interference with Petitioners' employment which resulted in their wrongful discharge from their state offices and employment.

Eleven of the Plaintiffs-Petitioners had permanent civil service appointments, four are State officers with term appointments which were made by the Governor and confirmed by the New York State Senate. The remaining Plaintiffs-Petitioners were staff members employed by the New York

State Bingo Control Commission (hereinafter referred to as "Bingo Commission") who were never dismissed by that Commission but were terminated by Respondents.

The Defendants-Respondents are the Governor of the State of New York, Hugh L. Carey, and members of his staff and other members of the Executive Department of the State of New York specifically identified in par. "8" of Petitioners' Complaint (30-32). They are all sued individually except for Comptroller Arthur Levitt and Ersa Poston, President of the New York State Civil Service Commission (28-30), against whom no judgment is sought. (32)

The Respondents' motion to dismiss the Petitioners' Complaint was made before answer and none of the Respondents have challenged any statements of fact set

forth in any of the Petitioners' various affidavits in support of their motion for a preliminary injunction or in opposition to granting Respondents' motion to dismiss the Complaint or in support of Petitioners' motion for summary judgment. Therefore, the Decision of the Appellate Division rests solely on the facts as set forth in the Plaintiffs-Petitioners' Complaint and the affidavits submitted on the five motions (two for reargument) set forth in the Petitioners' Record on Appeal to the Appellate Division.

Under the foregoing circumstances, Petitioners are entitled to have the Complaint construed in their favor (See Conley v. Gibson, 355 U.S. 41, 45-46.)

The procedural importance of this fact is that the Appellate Division has granted

Respondents complete and absolute immunity from liability for their intentional malicious interference with the Petitioners' employment without having a scintilla of evidence before it showing facts or circumstances which, coupled with proof of their good faith, might afford the Respondents a basis for being granted absolute immunity. Actually, Respondents never did claim any immunity since their defense throughout has been that their actions were legal (119, 125, and see pg. 9, Respondents' Brief to the Appellate Division, copy to be filed with Petition.).

Certain allegations of the Complaint herein must now be considered to be proven and res adjudicata as against the Respondents or, at least, they are collaterally estopped from denying said

allegations in Petitioners' Complaint. (See 5 New York Civil Practice, Weinstein-Korn-Miller, commencing with ¶5011.23, pgs. 50-114.) They are:

First, the allegations of the usurpation of the Petitioners' offices and positions as alleged in Petitioners' "SECOND CAUSE OF ACTION," ¶¶20-26 of the Complaint (37-44). This has already been decided by the New York Court of Appeals in the Church of the Ascension case, Appendix E, pgs. E-1 - E-2, which affirmed the Appellate Division, First Department, reported at 55 A.D. 2d 874, 390 N.Y.S. 2d 113 at 114, which actually involves the incident alleged in ¶21.B. of the Complaint (41-42).

Second, the allegations that neither the Bingo Control Commission itself nor the positions of the Plaintiffs-Petitioners

were abolished by the Legislature during the fiscal years 1975-76 and 1976-77. See Ball v. State, Appendix D, pgs. D-1 - D-24. Also see "FOURTH CAUSE OF ACTION," ¶¶37-44 (47-50), and the "FIFTH CAUSE OF ACTION," ¶¶45-50 (51-52) of the Complaint.

Therefore, this statement will be mainly devoted to the evidence of the Respondents' lack of good faith and their participation in a conspiracy to maliciously interfere with the Petitioners' employment.

One of the primary requirements of this Court with regard to the question of "absolute immunity" is the "good faith" of the official who acts. (Scheuer v. Rhodes, 416 U.S. 232 at 245-6; "Private Wrongs of Public Servants," 47 Calif. L.R. 303 at

323-4*, notes 123 and 124.)

The Court should note that the question of the "good faith" of the Respondents also comes into question under New York Civil Service Law with regard to the abolishment of the permanent civil service positions held by some Petitioners. It is well established in New York that an employee, holding permanent status in the classified civil service, may be suspended

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* "The only general statement safe to make is that ordinarily official get no favors from the law, but that in certain circumstances which must be ascertained from case to case and which depend on the injury complained of, a lesser standard, but never less than honesty of motive, will constitute a valid defense. However, if this is true, that the maximum lattitude allowed any administrative official in exercising his power is to act in good faith, then Dicey's argument is upheld, for his statement was clearly intended only to emphasize that officials arbritrariness under the Anglo-American law resulted in the personal liability of the official to his victum." (Emphasis supplied.)

as a result of abolition of his position for reasons of economy provided that the abolition is necessary and made in good faith.

See New York Civil Service Law, §§80, 80-a.

Matter of Schwab v. Bowen
80 Misc. 2d 763, 363 N.Y.S. 2d 464; affd. 51 A.D. 2d 574, 379 N.Y.S. 2d 111; affd. 41 N.Y. 2d 907, 394 N.Y.S. 2d 616.

Also see cases cited in New York State Attorney General's Opinion given to Respondent Goldmark's deputy, dated May 21, 1976 (274-275).

There is no difference with regard to immunity from liability between federal and state officials. See United States v. Lee, 106 U.S. 196, discussed in 77 Harvard L.R., pg. 1 at 23, "Suits Against Government and Officers: Sovereign Immunity.",

by Louis L. Jaffe, where the author states: "Furthermore, no distinction has ever been explicitly recognized in the cases between suits against state and against federal officials since rationalization has proceeded in terms of an abstract sovereign equally applicable to both types of cases."

When the Complaint was drawn, it was the primary intent of the Petitioners to compel the Respondents to reinstate the Bingo Control Commission, the Legislature having failed to adopt the necessary legislation to abolish the Commission and transfer its responsibilities to the Racing & Wagering Board (53-56 (Petitioners' Prayer for Relief) and Ball Affidavit, ¶9, pgs. 139-143).

However, with the denial of the Petitioners' motion for a preliminary injunction (Appendix C, pgs. C-1 - C-6), which the Court did not decide for four months, the dismissal of the Petitioners' Complaint (Appendix B, pgs. B-1 - B-9), which Decision was also delayed an additional month, and finally the passage of the bill actually abolishing the State Bingo Control Commission effective April 1, 1977, there is now left for adjudication only the causes of action alleging damages to the Petitioners for the intentional malicious interference with Petitioners' employment and wrongful discharge from their offices and civil service positions. It is with regard to these remaining causes of action that the Appellate Division, Third Department,

held, upon its own initiative, that the causes of action are barred by reason of the absolute immunity of the Defendants-Respondents. (Appendix A, pg. A-3)

The question of Respondents' immunity was never raised by the Respondents as a defense (119-128). Throughout this action, Respondents have always maintained that the Respondents' dismissal of the Plaintiffs was a lawful action. They claimed that what had occured was "the transfer of the functions of the (Bingo) Commission to the State Racing & Wagering Board." (120-124, ¶¶5-12). An examination of the parties' Briefs to the Appellate Division (to be filed with the Court) will reveal that the question of "absolute immunity" was not even briefed by either party. It was first raised by

by the Presiding Justice of the Appellate Division on the argument of the appeal when your Petitioner was asked whether or not the Respondents would not have immunity as to the causes of action set forth in the Plaintiffs' Complaint. Petitioner answered that the Respondents did not have immunity from an intentional tort.

This Court has held that officials "who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.", Butz v. Economu, ___ U.S. ____, 57 L Ed. 2d 895, at 916)*. There

* It is submitted that although Butz involved a federal officer, the rule is and should be the same for a state officer.

is total lack of any such proof.

THE FACTS.

Without any consultation with the Bingo Commission*, in January, Governor Carey announced in his 1975-76 Executive Budget his proposal to abolish the Bingo Control Commission and transfer its functions to the State Racing & Wagering Board (hereinafter designated as "R & W Board") to cut back the overhead costs of State government (A-6**; 47-58). On February 28, 1975, Budget Bill S3492/ A4509 calling for the abolishment of the

* Bingo was legalized by an amendment to the New York State Constitution in 1957 and implementing legislation was adopted effective January 1, 1958. The Commission was established as an absolutely independent body.

** Figures preceded by "A" refers to pages of Appendicies attached to Petitioners' Appellate Division Brief, a copy of which will be submitted with this Petition.

Bingo Commission was introduced by the Governor (59-a).

On March 10, 1975, 16 days before the budget was adopted, the Bingo Commission transmitted to the Governor an in-depth "Memorandum in Opposition" to the abolition and, in an accompanying letter (A-1)*; Chairman Ball stated:

> "I believe it most important that (such) a meeting be arranged in view of the fact that the cost of operating this Commission is completely supported by the fees paid by the charitable organizations conducting bingo, with a 'profit' of at least $300,000 during 1974 for the State.
>
> * * *
>
> Since legalization, bingo has never been considered as a revenue raising program by the State. * * * I cannot believe that you would have any part of 'taxing' churches, parochial schools, volunteer fire departments, American Legion posts and many other similar charitable organizations, just to raise revenue for the State." (A-1)(Emphasis supplied.)

* Attached to Petitioners' Appellate Division Brief.

The day before the 1975-76 State Purposes Budget was adopted by the Legislature as Chapter 50 of 1975, Chairman Ball received a reply to his letter from Governor Carey. In part the Governor wrote:

> "As you correctly point out, the State's interest in bingo is not to raise revenue for State purposes. Rather, the State's interest is to ensure the integrity of this important revenue source for churches, schools, volunteer fire departments, and other non-profit organizations eligible to conduct bingo as a fund-raising device." (72-3)

But, at pgs. 436-7 of his Executive Budget (A-3)*, under the title "REGULATION OF WAGERING", the Governor took the exact opposite position in his message to the Legislature, stating:

> "Legalized wagering produces significant amounts of public revenue which would otherwise have to be raised through taxes."

* * *

* Attached to Petitioners' Appellate Division Brief.

> "Transfer of responsibility for regulation and control of Bingo from the Department of State to the Board is also recommended in order to complete the consolidation under the jurisdiction of the Board of regulation of all types of legalized wagering activities." (Emphasis supplied.)

It is obvious that from the very start of fiscal year 1975-76 the Governor intended to use the income from bingo licensing fees for "public revenue" which he actually did in the amount of over one million dollars as is proven by the report of the Director of State Accounts to Petitioner Ball (276).

The requested meeting never took place and, although the bill to abolish the Bingo Commission (A4509) passed the Assembly, it never passed the Senate. In spite of the fact no funds were actually to be appropriated to the R & W Board unless

and until the Bingo Commission was abolished by the Budget Bills, between April 1 and 10, 1975, the Respondent Secretary of State Cuomo and Respondent Croteau dismantled both the Albany and New York City Offices of the Bingo Commission, "terminated" the Commissioners, its staff and all permanent civil service employees of the Commission except for ten people transferred to the R & W Board.

On April 7, 1975, Respondent Carey signed the amended State Purposes Appropriation Bill which became Chapter 50 of the Laws of 1975. On April 9, Petitioner Ball received a letter of termination from the Respondent Burke, Secretary to the Governor, who stated that the reason for Ball's termination was the "difficult

fiscal circumstances."* (74) Burke wrote Ball:

> "The Bingo Control Commission was among these (abolished) and he (Governor Carey) has now signed into law the legislation effecting this elimination." (Emphasis supplied.)(74)

This was a total misstatement of fact because the State Senate had not passed the legislation necessary to abolish the Bingo Commission. On April 11, in rejecting the notice of termination, Ball wrote Burke a letter wherein he challenged his statement that the Governor had signed the bill abolishing the Commission and the Respondents' right to "eliminate" the Commission and to terminate his office (75); pointed out there were no "difficult fiscal circumstances" with regard to funding the Bingo Commission (76); stated that the Governor was violating his Oath

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* This was the same reason given to the other Petitioners.

of Office; warned that the "State of New York cannot siphon off three quarters of a million dollars (from bingo license fees) for general tax purposes." (77-79) The Court is urged to read the letter in toto since the letter goes to the very heart of this entire situation.

Respondent Burke replied to Ball on May 1, 1975 (80), admitting that only the Assembly had passed the budget bill abolishing the Bingo Commission but he claimed that:

> "(A)ssurances have been given to the Department of Audit and Control by the Secretary of the Senate Finance Committee that it will be passed by the Senate. These assurances were requested after the Legislature did approve the transfer of funds to the Racing and Wagering Board for the purpose of regulating bingo. These actions can be interpretted as a statement of legislative intent to formally abolish the Commission by passage of the implementing legislation which carries an effective date of April 1, 1975." (Emphasis supplied.)

With the foregoing statement Respondent Burke jumped from the frying pan into the fire because with this letter Burke added two more totally false statement to his first one that the Governor had signed the bill which eliminated the Commission.

On May 5, 1975, Chairman Ball wrote Senator John J. Marchi, Chairman of the Senate Finance Committee, asking for an explanation of Respondent Burke's statement that "assurances have been given to the Department of Audit and Control by the Secretary of the Senate Finance Committee that it (the bill abolishing the Bingo Commission) will be passed in the Senate." (164)

In Senator Marchi's reply to Chairman

Ball (165) he ended his letter as follows:

> "You will also note that the memorandum does not make any commitment as to future action of the Committees or the Senate or the Assembly concerning other bills pending before the legislature." (Emphasis supplied.)

This is proof absolute of Respondent Burke's second falsification.

The "memorandum" referred to above is that of the Secretaries of the Senate Finance and the Assembly Ways and Means Committees and is printed at pgs. 25-26 of the Record on Appeal. The Court's attention is directed to the following sentence in the fourth paragraph of the memorandum, dated the same day the 1975-76 Budget was adopted:

> "Normally, in the absence of specific language so provided, we do not interpret an appropriation act as furnishing substantive authority to public officers, departments and agencies

> to perform functions, powers and duties." (Emphasis supplied.)

This was a clear warning to the Respondents Carey, Burke, Goldmark and Van Laak that there had been no "function transfer" of Bingo functions to the R & W Board by adoption of the Budget, a warning which the Respondents proceeded to completely ignore.

The third, and in many ways the most important misrepresentation of fact by Burke, was his statement in the second paragraph of his letter to Ball (80) that "these assurances were requested after the Legislature did approve the transfer of funds to the Racing and Wagering Board for the purpose of regulating bingo." (Emphasis supplied.) The language of the Joint Legislative Committee was very clear in its

"Statement of Intent" (100) and it is now res adjudicata from the Court of Appeals Opinion in Ball v. State (Appendix D, pgs. D-1 - D-24, that there was no "transfer of funds to Racing and Wagering for the purpose of regulating bingo." As a matter of fact, the Court of Appeals (41 N.Y. at 622) held that a fair reading of the "Statement of Intent" clearly indicated that it was the expressed intent of the Joint Committees not to abolish the Bingo Commission unless and until Budget Bill S3429/A4509 became law.

But the Respondents decided to "stonewall it" and took the position that the abolishment of the Commission was accomplished by the adoption of the 1975-76 Budget and the Joint Reports of the Legislative Fiscal Committees. (A-15)*

* Attached to Petitioners' Appellate Division Brief.

After the Legislature adjourned on July 12, 1975, Petitioner Ball attempted, through the Respondent Cuomo, to have the Bingo Commission reinstated (139) and on the 15th of July, he met with Robert Morgado, then Assistant Secretary to Respondent Carey, who, after a short discussion, informed Ball that "he was going to call a meeting of representatives from Budget, the Governor's Counsel's Office, perhaps Audit and Control, Chairman Sarafan of R & W Board, Secretary of State Cuomo, Chairman Ball and himself sometime during the week of July 20, 1975; that Chairman Ball was to be responsible for the Agenda." (140)

On the morning of July 15, Chairman Ball was informed by former Bingo

Commission Senior Stenographer Kathy Grogen that: "I'm sorry Mr. Ball, but I have received instruction from the R & W Board in New York (Petitioner believes that she said Mr. Golar) ordering me not to do anything for you. That's why I haven't typed up the letter.", which Chairman Ball had given Ms. Grogen the day before (141).

The same day, Chairman Ball was informed by one of the senior accountants, formerly in the New York City Office of the Bingo Commission, from whom he had requested the number of audits conducted by the Bingo Commission accounting staff since April 1, 1975, that "Mr. Golar had instructed him (the accountant) not to give any such information, that he (Ball) should apply in writing as required by

the Freedom of Information Act." (141)

> "That immediately after the aforesaid conversation with the accountant, your deponent (Ball) called the defendant Sarafan and said: 'What the hell's going on Bert? Since February you have always taken the position that you would not assume any of the duties and responsibilities of the Bingo Commission until the bill (S3492/A4509) was passed and the Commission abolished. What the hell's going on?' The defendant Sarafan replied: 'You are absolutely right, Ira. But Monday (or Tuesday) I got a call from John Van Laak who told me that Burke had told him that they (the Executive Department) was going to stand on the Executive Budget and the Appropriation Bill for authority for me to take complete charge of Bingo. I told Van Laak that they were crazy, but what the hell could I do, Ira, you know my position.' The defendant Sarafan's 'position' is that he serves as Chairman of the R & W Board <u>at the pleasure of the Governor</u>." (143)(Emphasis supplied.)

The foregoing stands undenied.

Before noon on July 22, Chairman Ball delivered to Mr. Morgado's office the

Agenda he had prepared for the meeting Morgado said he was going to call. Mr. Ball was told to return after 2 p.m. because Mr. Morgado was "with the Governor." Although Mr. Ball returned to Mr. Morgado's Office he was unable to see him that day and, in spite of the fact he left messages with Mr. Morgado's secretary, Chairman Ball never thereafter heard from either Mr. Morgado or his secretary. (142)

On the 15th of August, 1975, the Respondent Governor set out on a course of action that was completely inconsistent with the position he and the other Respondents had taken with relation to the Bingo Commission.

From the start, when the Respondent Carey submitted his Executive Budget for

1975-76 to the Legislature, the documentary evidence proves that he intended to treat the abolishment of the Bingo Commission and the Athletic Commission in the identical manner.

In the "MESSAGE OF THE GOVERNOR", under the title "HIGHLIGHTS OF THE 1975-76 BUDGET" (A-6)*, the Respondent Carey states:

> "I have spoken to you of my determination to cut back the overhead costs of State Government as far as possible. To that end, I am recommending several changes in agency structure and staffing patterns to be implemented during 1975-76. Under my proposals:
>
> * * * *
>
> The Bingo Control Commission will be abolished and its functions transferred to the State Racing and Wagering Board;
>
> The Athletic Commission will be abolished and its regulatory functions transferred to the Department of State;
>
> * * * *."

* Attached to Petitioners' Appellate Division Brief.

To implement the foregoing, on February 28, 1975, Respondent Carey introduced consecutive Budget Bills S3492/A4509 (59a-59d) and S3493/A4510 (162) to abolish the Bingo Commission and the State Athletic Commission. Both bills were passed by the State Assembly on March 25-26, 1977 (A-8)* He made no provision for funding either Commission in his Executive Budget. There was no mention in the State Purposes Appropriation Bill (Chapter 50 of the Laws of 1975) of an appropriation for either Commission. Up to the time of the adjournment of the Legislature, both Commissions were treated like "Siamese twins."

But on August 15, 1975, Respondent Carey appointed James A. Farley, Jr., as a member and chairman of the State Athletic Commission (81) and in the press release

* Attached to Petitioners' Appellate Division Brief.

announcing the appointment is found the following:

> "The Governor named Mr. Farley to the position after the Legislature failed to approve his proposal to transfer the powers and duties of the Athletic Commission to the Department of State." (Emphasis supplied.)

This is documentary proof that the Governor and the other Respondents knew and understood from the very start that the failure of the Legislature to pass the Governor's Budget Bills to abolish the Bingo Commission and Athletic Commission legally prevented the transfer of any powers and duties of the Bingo Commission to the R & W Board.*

It is submitted that the Respondents cannot have it both ways: If the State Athletic Commission was not abolished as must be conceded from the certification

* See Respondent Sarafan's statement on pg. 39, supra.

of appointment by the Respondent Cuomo (81), then the Bingo Commission also must be considered as having survived as the Court of Appeals held in Ball v. State. The appointment of Farley and the implementation of his appointment by Respondents Carey, Goldmark, Van Laak, Cuomo and Croteau resulted in a binding practical interpretation that the Governor failed to abolish both Commissions, that the Bingo Commission had survived and as a matter of law, it was entitled to the same treatment accorded the Athletic Commission. See U.S. v. American Trucking Assoc., 310 U.S. 534.

The treatment accorded the Petitioners by Respondents as compared to the continuation and funding of the Athletic Commission was so discriminatory that it must

be held that Respondents have denied the Petitioners their constitutional right to equal protection under the law.

But there is additional proof Respondents knew the Bingo Commission had not been abolished. On January 20, 1976, knowing the Bingo Commission still legally existed, Governor Carey submitted to the Legislature another Budget Bill calling for the abolition of the Bingo Commission (101), identical with the 1975 Budget Bill except Sec. 8 of the 1975 bill was omitted and Sec. 9 reworded and renumbered Sec. 8 to read as follows:

"All appropriations made to the state bingo control commission pursuant to section one of chapter fifty of the laws of nineteen hundred and seventy-five,* to the extent of remaining unexpended balances, are hereby transferred to and made available for use by the state racing and wagering board for the payment of liabilities heretofore incurred by the state bingo control commission." (Emphasis supplied.) (102)

This was a blatant admission** that funds had not been appropriated to the R & W Board in the 1975-76 Budget as Petitioners maintained in their moving affidavit on their motion to dismiss the within Complaint, sworn to on the 16th day of December, 1975 (119-125) and that the Respondents*** knew it when the Bingo

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* The 1975-76 Appropriation Bill

** So treated by Judge Gabrielli in his Court of Appeals Opinion at pgs. 621-22 of 41 N.Y. (See Appendix pg. D-8)

*** Reference to Defendants-Respondents is to all Defendants except Posten and Levitt.

Commission was "plowed under" by them. This is documentary proof positive of the lack of good faith (possibly perjury) on the part of the Respondents since the 1976 Budget Bill was prepared and submitted to the Legislature by the Executive Department (101).

In summary, the Respondents' total lack of good faith and their malicious and reckless disregard of the rights of all the Petitioners are proven by the following:

(1) The total failure of the Respondents, particularly Carey, Goldmark, Burke and Van Laak, to consult with the members of the Bingo Commission prior to the preparation of the 1975-76 Executive Budget (or at anytime) as to what the effect of the transfer of the responsi-

bilities of the Bingo Commission to the R & W Board, with a greatly reduced staff, would have on the bingo enforcement program.

(2) Misrepresentations by the Respondent Carey in his letter of March 10, 1975 to the Petitioner Ball that he did not intend to use Bingo licensing fees "to raise revenue for State purposes" (72), which Ball at least inferentially accused Carey of having as his intention (A-1)*.

(3) The termination of the operation of the Bingo Commission without any statutory or other authority. (See Ball vs. State, Appendix D, pgs. D-1 - D-24, and Church of the Ascension case, Appendix E, pgs. E-1 - E-2.

* Attached to Petitioners' Appellate Division Brief.

(4) The false statement written by the Respondent Burke to the Petitioner Ball, indicating that (a) the Senate had passed or, later, was going to pass the bill to abolish the Bingo Commission and (b) that there was a lack of funds to continue the operation of the Bingo Commission when there was more than sufficient funds available (36).

(5) False representations by the Respondent Burke "that assurances have been given to the Department of Audit and Control by the Secretary of the Senate Finance Committee that it (Budget Bill S3492) will be passed in the Senate." (80), when no such assurance had been given (165 and 26).

(6) Total disregard of the contents of Deputy Comptroller's Ives' memorandum of

March 31, 1975 (25) that (a) Audit and Control did "not interpret an appropriation act (Chapter 50 of 1975) as furnishing substantive authority to public officers, departments, and agencies to perform functions, powers and duties," and (b) to effectuate the transfer of functions, powers and duties "the enactment of substantive changes in the law" had to be made and the Respondents then adopting the contrary as "State policy." (25 and A-15*)

(7) The refusal of the Respondents Carey, Burke, Goldmark, Van Laak, Cuomo and Croteau to meet with Chairman Ball, after the adjournment of the Legislature without adopting the bill to abolish the Commission (139-142), to "revive" the Bingo Commission.

(8) Delibrately ignoring the clear

* Attached to Petitioners' Appellate Division Brief.

language of the "Statement of Intent" set forth in the 1975 Report of the Joint Legislative Fiscal Committees "on actions taken on the 1975-76 Executive Budget." (See Ball v. State, Appendix D, pgs. D-1 - D-24)

(9) The inherent admission by Respondent Carey in appointing James A. Farley, Jr., as a member of the State Athletic Commission and Chairman "after the Legislature failed to approve his (Carey's) proposal to transfer the powers and duties of the Athletic Commission to the Department of State" (A-5)*, that Respondents knew, prior to August 15, 1975 (81), that it was mandatory that Budget Bills be passed before either the Athletic Commission or the Bingo Commission could

* Attached to Petitioners' Appellate Division Brief.

be legally abolished and their duties and responsibilities transferred elsewhere and then maintaining the contrary upon their motion to dismiss Petitioners' Complaint herein.

(10) Finally, written proof of the complete lack of good faith on the part of the Respondents is established by the letter written 29 days before James A. Farley's appointment, on July 17, by Deputy Director of the Division of the Budget Miller (A-15)* to the Respondent Sarafan regarding "the disposition of the State's Bingo Control Activities." which "should be considered State policy on this matter." Paragraphs two, three and four of the letter are replete with misstatements of facts, particularly with

* Attached to Petitioners' Appellate Division Brief.

regard to the intent of the Legislature by enactment of Chapter 50 of the Laws of 1975 as the Court of Appeals and Appellate Division found in Ball v. State, Appendix D, pgs. D-1 - D-37.

In the Depression years of the 1930's, Mr. Justice Peter Schmuck, in the case of Danker v. Dptmt. of Health, 153 Misc. 502, 276 N.Y.S. 239; affd. 242 A.D. 765, 275 N.Y.S. 340; affd. 256 N.Y. 365, established the standard by which the action of any municipality or other level of government should be measured when terminating, for alleged reasons of economy, the positions of civil service personnel holding permanent appointments. The case dealt with the suspension of a civil service employee in New York City and, at pgs. 239-241 of 276 N.Y.S., he stated:

"As the question here involved is of vital importance, not only to Plaintiff, but to many others in a similarly unfortunate condition, meticulous consideration has been given to it, not only to observe the letter of the law,* but especially to invoke and obey the spirit thereof.

* * *

"Above all, the suspension must be occasioned by lack of funds, lack of work, and the advisability of temporary abolition of the postition.

* * *

"***, yet shall the Petitioner have her prayer granted, for in a government by law all must be satisfied that constituted authority must exercise delegated powers sincerely, in good faith, and with unquestionable impartiality." (Emphasis supplied.)

It is respectfully submitted that the Respondents herein did not meet any of the above standards. As the record proves: (1) there was partiality towards the

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* New York City Economy Act, Laws 1934, c 178, §16.

officers and employees of the Athletic Commission since they retained their jobs, (2) there was no lack of funds, (3) no lack of work, and (4) the advisibility of the abolition of the Commission was contrary to the Moreland Commission Report on Bingo Investigation, dated March 1, 1962, the bill-jacket for the implementing statutes regulating bingo, Article 19-B of the Executive Law and Article 14-H of the General Municipal Law. This was specifically pointed out to the Respondent Carey two weeks before the 1975-76 Budget was adopted. On March 17, 1975, Hon. Thomas B. Gilchrist, Jr., the Moreland Commission who wrote the "Report on the Bingo Control Inquiry" (A-16)*, sent a personal letter to the Governor, a copy of which is attached as Appendix 19 to

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* Attached to Petitioners' Appellate Division Brief.

the Petitioners' Brief to the Appellate Division. Mr. Gilchrist advised the Governor that:

> "To abolish the Bingo Commission is to reject the Legislative (and Executive) mandate to supervise Bingo operations from the State level. To fail to budget and appropriate funds for this to be done is to turn the clock back to 1960." (A-19a)*

This was also the point of the in-depth "Memorandum in Opposition" prepared by the staff of the Bingo Commission referred to at pg. 27, supra.

It is respectfully submitted that the record herein proves beyond any doubt that Respondents' actions as alleged in the Complaint herein were done not with "good faith" but with "bad faith".

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* Attached to Petitioners' Appellate Division Brief.

HOW THE FEDERAL QUESTIONS WERE RAISED.

A. As alleged in Petitioners' Complaint:

1. In ¶¶31, 32, 33 and 41 of the Complaint (45, 46, and 49), facts are alleged indicating the violation of the XIV Amendment to the United States Constitution, §1, by the diversion of income from what had been legitimate bingo license fees imposed by the Legislature under the police power of the State, into the General Fund of the State as revenue, thus converting the license fees into an unconstitutional excise tax.*

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* Part of the theory behind the allegations in the "THIRD CAUSE OF ACTION" is that Petitioners had a direct interest in compelling Respondents to constitutionally use the Bingo license fees to pay for the operation of the Bingo Commission enforcement program (which in the past had always included Petitioners' salaries) and to enjoin such diversion by Respondents Carey, Goldmark, Burke, Van Laak, Cuomo and Croteau for State General Fund purposes.

2. In ¶43 of the Complaint (49-50), facts are alleged regarding the deprivation of the civil service Petitioners' XIV Amendment rights of due process of law, vix: termination without notice and without a hearing as required by §75 of the New York State Civil Service Law (supra, pgs. 13 and 13a).

3. In ¶¶22-24 (42-43) and ¶49 (52) facts are alleged which constitute deprivation of Petitioners' "constiutitional rights and property without due process of law" by the usurpation or causing the usurpation of their offices and civil service positions which resulted in their wrongful discharge.

B. In Petitioners' Motion Papers Before Special Term:

1. Ball Affidavit sworn to on November 20, 1975 (14) where it is claimed that Petitioners were "unconstitutionally discharged."

2. In ¶3 of Ball Answering & Moving Affidavit sworn to on December 30, 1975 (131-132), where facts are alleged concerning the Respondents' actions which resulted in the unconstitutional imposition of an excise tax upon the licensees of the Bingo Commission, which would be a violation of the XIV Amendment rights of the Petitioners and the Commission's licensees as explained in the footnote on pg. 57, supra.

3. In ¶8.F. (138-139) of said December 30, 1975 Affidavit, Petitioners allege denial of their right to equal protection of the law in violation of the XIV Amendment by Respondents giving preferential treatment to the officers and employees of the Athletic Commission who did not lose their jobs although they were in the identical position as Petitioners insofar as the

failure of the Legislature to transfer their functions to the Office of the Secretary of State.

4. In ¶18 of Ball Moving Affidavit sworn to on the 1st day of July, 1976 (261-262, 264-265) where facts are again alleged regarding the denial of equal protection of the law under XIV Amendment.

The foregoing points were presented to Special Term in POINT VI, pgs. 40-44 of Plaintiffs' (Petitioners') Memorandum of Law, submitted upon Respondents' Motion to Dismiss Plaintiffs' Complaint, a copy of which will be filed with this Petition.

C. In Petitioners' Briefs to the Appellate Division of the Supreme Court, Third Department:

1. In POINT II.A., pgs. 35-43, which is entitled "PLAINTIFF-APPELLANTS HAVE

BEEN DENIED THEIR CONSTITUTIONAL RIGHT OF EQUAL PROTECTION UNDER THE LAW."

2. In POINT II.B., the subpoint entitled:

> "Under the Police Power, Bingo Licensing Fees Must Be Used by the State for Bingo Administration and Enforcement." (p 45-50 of said Brief.)

which discussed the imposition of an excise tax upon licensees in violation of the XIV Amendment that resulted in the diversion of license fees needed to sustain the operation of the Bingo Commission by Respondents including Petitioners' salaries.

D. In Connection with Petitioners' Attempt to Have the New York Court of Appeals Review the Appellate Division's Decision, Appendix A:

1. In the Petitioners' Affirmation dated August 24, 1978 (copy to be filed with this Petition) in answer to the Re-

spondents' "Motion to Dismiss Petitioners' (direct) Appeal to the Court of Appeals" as a matter of right, several constitutional questions were specifically raised. They are:

a. Depriving the civil service Petitioners of their permanent employment without the due process of law to which they are entitled and is required by §75 of the New York State Civil Service Law and Article 5, §6 of the New York State Constitution. See par. "First" at pgs. 3-5, of said Affirmation, attached as Appendix F, pgs. F-1 - F-5.

b. In par. "Second", pgs. 10-12, wherein is discussed the denial of the Petitioners' "CONSTITUTIONAL RIGHT OF EQUAL PROTECTION UNDER THE LAW." and

reference is again made to POINT II.A., pgs. 35-43 of Petitioners' Appellate Division Brief. Specific reference is made to subparagraphs "A" through "D" on said pgs. 10-12 of the Affirmation.

2. In Petitioners' Brief upon their Motion for Leave to Appeal to the Court of Appeals dated October 10, 1978, a copy of which will be submitted with this Petition:

a. The constitutional question appears in questions 3 and 4 (at pgs. 3 and 4) of "QUESTIONS OF LAW PRESENTED" where the following questions were submitted to the Court of Appeals by Petitioners:

"3. Do the Defendants-Respondents State officers and employees have 'absolute immunity' from liability for damages suffered by the Plaintiffs-Appellants State officers and employees as a result of the violation of their constitutional rights pursuant to §§6 and 11 of

Article 1 of the New York State Constitution and the XIV Amendment to the U.S. Constitution, which sections guarantees Plaintiffs their right to due process of law and equal protection of the law in their right to be employed and received compensation therefore?

The Appellate Division answered the question in the affirmative.

4. Did the Plaintiffs-Appellants (a) have 'standing to raise the issue' of the State bingo licensing fee being converted into an 'unconstitutional revenue tax' (excise tax) by Defendants-Respondents; (b) should Special Term have granted the Plaintiff-Appellants' motion to add as Plaintiffs four bingo licensees, all of whom paid the alleged unconstitutional license fee and sought to become parties Plaintiff; and (d) did Special Term err in refusing to grant Plaintiffs-Appellants permission to serve a supplemental summons and amended complaint to add parties Plaintiff?

The Appellate Division answered the question in the negative."

b. In "POINT I." of said Brief, (pgs. 6-10), entitled: "THERE IS NO

'ABSOLUTE IMMUNITY' FOR ALL TORTIOUS CONDUCT COMMITTED BY THE NEW YORK STATE OFFICERS AND EMPLOYEES, PARTICULARLY THAT INVOLVING UNCONSTITUTIONAL ACTS."

c. In "POINT II." of said Briefs (10-14) entitled: "THE PLAINTIFFS-APPELLANT HAVE A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT."

d. In "POINT IV" of said Brief (pgs. 17-18) where the same issue is mentioned as in C.2., pg. 61, supra.

REASONS FOR GRANTING THE WRIT.

There are two special and important reasons why a writ of certiorari should be granted herein:

First, the New York courts have departed from their case law developed over 150 years* and, for the first time, have held that the Governor of the State of New York and other high officials and employees of the Executive Department are "absolutely immune" from liability for intentional tortious conduct committed against other state officers holding term appointments and civil service personnel holding permanent appointment. The absolute immunity was extended even though the intentional

* See Adsit v. Brady, 4 Hill (N.Y.) 631.

acts (malicious interference with Petitioners' employment and wrongful discharge) deprived Petitioners of their property rights in continued employment, which right is safeguarded by their constitutional rights (1) to due process of law and (2) the right to equal protection of the law, guaranteed by both the XIV Amendment to the United States Constitution and §§6 and 11 of Article 1 of the New York State Constitution. See Cooperman v. Department of Correctional Services, 57 A.D. 2d 989, 394 N.Y.S. 2d 324 at 325-6, citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S Ct. 2701, 33 L Ed. 2d 548.

Second, said determination by the New York courts is also contrary to the decision of the Supreme Court of the

United States.

The Appellate Division herein has held that, assuming that all of the allegations in Petitioners' Complaint are true, the Resspondents need not respond in damages because of the "absolute immunity" they have from their intentional, tortious conduct (Appendix A, pg. A-1.)

RE CIVIL SERVICE PERSONNEL: Article 5, §6 of the Constitution has been interpreted by the New York Court of Appeals as giving "at least something like permanency of tenure to appointees in the civil service, and above all to put an end to the vicious practice which had grown up out of changing employees whenever the appointing power was changed without any cause

except the unrestrained will of the person who happened for the time being to be at the head of the department."

Matter of Seeley v. Stevens, 190 N.Y. 158, 163.

> "If the Legislature should repeal all the (Civil Service) statutes and regulations on the subject of appointments in the civil service, the mandate of the Constitution would remain, and would so far execute itself as to require the court, in a proper case, to pronounce appointments made without compliance with its requirements illegal. (People ex rel McClelland v. Roberts, 148 N.Y. 360, 366.)"
>
> Wipfler v. Klebes
> 284 N.Y. 248 at 254.

Both the New York Court of Appeals and the Supreme Court of the United States have held that tenured (permanent) civil service appointees have a constitutionally protected interest, even a property interest, in their right to employment

and compensation therefor, of which they cannot be deprived without due process, including at least a hearing. See Slochower v. Bd. of Education, 350 U.S. 551, 76 S.Ct. 637, 100 L Ed. 692; Harris v. Mechanicville Central Sch. Dist., 86 Misc. 2d 144, 382 N.Y.S. 2d 251 at 254; mod. other grds., 57 A.D. 2d 231, 394 N.Y.S. 2d 302.

In the case at bar, the rights of the permament, tenured civil service Petitioners are firmly grounded in the highest expression of public policy in the State--the provisions of Article 5, §6 of the New York State Constitution. The Appellate Division's decision in this case collides with the ever-present and dominating constitutional safeguards protecting permanently appointed civil service personnel

which the New York Court of Appeals has declared it always stands ready to protect. (Corwin v. Farrell, 303 N.Y. 61 at 66.)

A statute which clearly conflicts with a constitutional provision must fall. See McKinney's Consolidated Law of New York, Book 1, Statutes, §150, Pgs. 309-310, notes 71-73. Therefore, it is respectfully submitted that if the foregoing applies to statutory enactments, a fortiori, it must apply to judicially established case law.

RE NON-CIVIL SERVICE PERSONNEL: Both non-civil service personnel, who held exempt status as classified under the Civil Service Law, and the permanent civil service personnel, have been denied their

right to equal protection under the law, a point Petitioners raised but which was ignored by the Appellate Division because of the "absolute immunity" it conferred on the Respondents. The point is briefed in depth in Petitioners' Appellate Division Brief, POINT II.A., pgs. 35-43, entitled: "PLAINTIFFS-APPELLANTS HAVE BEEN DENIED THEIR CONSTITUTIONAL RIGHT OF EQUAL PROTECTION UNDER THE LAW."

The question has been involved in this case from the outset when the Petitioners moved for a temporary injunction. In their Reply Affidavit dated December 10, 1975, ¶¶13 and 14 (67-68), the unequal treatment of the Petitioners as contrasted with the treatment afforded officers and employees of the State Athletic Commission was alleged. The question was again

alleged in Petitioners' Answering Affidavit on the Respondents' motion to dismiss the Petitioners' Complaint (135-139).

Both the State and Federal Constitutions guarantee the Petitioners' equal protection pursuant to the XIV Amendment of the United States Constitution and Article 1, §11 of the New York State Constitution. Both provisions proclaim a public policy of a much higher authority than the case law policy enunciated by the Appellate Division in their decision granting "absolute immunity" to the Respondents. The effect of the "absolute immunity" rule is to override the constitutional protection afforded by the State and Federal Constitutions to all Petitioners, which in and of itself is an unconstitutional determination by that Court.

In Cooper v. Aaron, 358 U.S. 1, 3 L Ed. 2d 5 at 16, 78 S.Ct. 1401, this Court held:

> "The controlling legal principles are plain. The command of the 14th Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.
>
> The constitutional provisions, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted shall deny to any person within its jurisdiction the equal protection of the laws." (Emphasis supplied.)

The New York Court of Appeals has also held that:

> "An agency of the State denies equal protection when it treats persons similarly situated differently under the law * * * and this difference may be created by the grant of a preference as well as by the imposition of a burden."
>
> Abrams v. Bronstein
> 33 N.Y. 2d 488, 354 N.Y.S. 2d 926-929-30.

> "The right to equal protection of the laws is a constitutional protection against what is frequently referred to as 'class legislation'. The essence of the right to equal protection of the law is that all persons similarly situated be treated alike. (Citing cases)."
>
> Myer v. Myer
> 271 A.D. 465, 66 N.Y.S. 2d 83 at 90; affd. 296 N.Y. 979.

The facts herein sustain a finding that the Petitioners have been subject to "individual discrimination", "clear and intentional" in violation of the XIV Amendment. See DiMaggio v. Brown, 19 N.Y. 2d 283, 290; 279 N.Y.S. 2d 161, 166.

The foregoing is discussed in depth under POINT II.A. of Appellants' Appellate Division Brief, entitled: "PLAINTIFFS-APPELLANTS HAVE BEEN DENIED THEIR CONSTITUTIONAL RIGHT OF EQUAL PROTECTION UNDER THE LAW" commencing at pg. 35, copy to be

filed with this Petition.

The Petitioner Commissioners Freda, Pickney and Moskovit are in the same position that the Petitioner Ball was in Ball v. State, (Appendix D, D-1 - D-24.) and are entitled to the same constitutional protection that Ball received*, including their right to salary as provided in ¶5 of §433 of the Executive Law (50, ¶43, Complaint, as amended).

The Petitioner-Appellant Commissioners were all appointed for a definite and fixed term by the Governor, their salaries were fixed by law and "attached to the

* In this action, Ball only seeks to be reimbursed for the expenses he incurred after April 1, 1975 in attempting to perform his duties and responsibilities.

office"; through no fault of their own, they were prevented from performing their duties. Nichols v. MacLean, 101 N.Y. 528 at 533, sustains the Petitioner Commissioners' right to their salary and any expenses incurred after April 1, 1975.

All of the foregoing is also applicable to the Petitioner staff members (Lynch, Tedesco and Jensen) who were appointed by the Commission pursuant to ¶7 of §433, Executive Law, and were never terminated by the Commission (¶7, Complaint (30).).

CONFLICT WITH THE FEDERAL LAW.

The decision of the Appellate Division, Third Department, is in direct conflict with the decision of this Court in Belknap v. Schild, 161 U.S. 10, 18-21, 40 L Ed. 599 and Scheuer v. Rhodes, 416 U.S. 232

at 242-249.

The Petitioners holding permanent civil service status have recognized rights in their continued employment which are safeguarded by procedural due process and cannot be extinguished except for cause, following an opportunity for a hearing. See Bd. of Regent of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L Ed. 2d 548 and other cases cited by the Appellate Division, Third Department, in Cooperman v. Commission, Dept. of Correctional Services, 57 A.D. 2d 989, 394 N.Y.S. 2d 324 at 325-6.

In Belknap v. Schild, supra, this Court held:

> "But the exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person

> whose rights of property they have wrongfully invaded or injured, even by authority of the United States (citing cases.). Such officers or agents, although acting under the order of the United States, are therefore personally liable to be sued for their own infringement of a patent. (Citing Cases.)" (Pg. 18 of 161 U.S.)
>
> * * * *
>
> "'Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defence, he must show that his authority was sufficient at law to protect him.' * * * To this class belongs also the recent case of U.S. v. Lee, 106 U.S. 196, for the action of ejectment in that case is in its essential character, an action for trespass, with the power of the courts to restore the possession to the plaintiffs as part of the judgment. * * *." (Pg. 19 of 161 U.S.)

The Court is reminded that the only

authority that the Respondent Governor had over the State Bingo Control Commission was to (1) appoint the members of the Commission, (2) to designate its Chairman, with the consent of the New York State Senate, and (3) to remove them for cause. See §433 of the New York Executive Law, supra, pgs. 13-a- 14. The remaining Respondents had absolutely no authority over Petitioners.

It is respectfully submitted that the usurpation of the Petitioners' offices and civil service positions is actually a "trespass" upon the Petitioners' property (their offices and civil service positions).

The liability of the officers is the same whether they are State or Federal officers. See pg. 22, supra.

The immunity of the sovereign from

suit does not protect public officers from personal liability for their wrongful acts in excess of their official authority, and an officer--executive, administrative, quasi-judicial, ministerial, or otherwise--who acts outside the scope of his jurisdiction and without authorization of law, may thereby render himself subject to personal liability in a civil suit.

Cooper v. O'Connor
99 F 2d 135, cert. den. 305 U.S. 643 and 673, 83 L Ed. 436 and 1530, 59 S.Ct. 241 and 1035.

63 Am Jur., Public Officers, §291, pgs. 801-802, note 39.

Petitioners appreciate that Scheuer, supra, pgs. 77-78, was an action pursuant to 42 USCA 1983, a so-called "civil rights" case, but it is submitted that (1) Petitioners' civil rights herein have been invaded by the Respondents and (2)insofar as

Respondents' immunity is concerned, there is no difference in theory between immunity in the case at bar and a case brought pursuant to 42 USCA 1983.

As stated in Scheuer, at pg. 248 of 416 U.S.:

> "Under the criteria developed by the precedents of this Court, §1983 would be drained of meaning were we to hold that the acts of a governor or other high executive official have 'the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.' Sterling v. Constantin, 287 U.S., at 397. In Sterling, Mr. Chief Justice Hughes put it in these terms:
>
> 'If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at anytime disclose by the simple process

> of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Upon our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overriden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression.'" (Emphasis supplied.)

If the foregoing applies to a statute in New York, a fortiori, it must apply to judicially established case law such as the Appellate Division has established for the first time in the case at bar.

CONFLICT WITH NEW YORK STATE LAW

Up until the within Decision, there has never been "absolute immunity" for New York State officers and employees for tortious

conduct (other than the judiciary) particularly when the conduct involved unconstitutional actions.

The Courts of the State of New York have held personally liable members of the Long Island State Park Commission, the State Engineer and his assistants, the State Superintendent of Public Works, the State Conservation Commission, the Transit Commission of the State of New York and many others.

Pauchogue Land Corp. v. Long Island State Park Commission, 243 N.Y. 15, involved the personal liability of the members of that Commission. The Court of Appeals, at pg. 23 thereof, casts great doubt upon the "absolute immunity" theory by stating:

> "But, though the state cannot be subjected to hostile litigation at the instance of the individual, that immunity is not possessed by its officers, who can be held responsible for illegal trespass or torts on the rights of an individual, even though they act or assume to act under the authority and pursuant to the directions of the state. * * * But the sovereign's agents are not above the law. The illegality of the official's act does not place him above the immunity of the sovereign. He must justify himself by showing that he acted rightfully as a public officer. (Citing cases.)" (Emphasis supplied.)

Pauchogue is factually in point with the case at bar. There, the Park Commission attempted to appropriate by condemnation certain lands of the plaintiff who had "the constitutional right to just compensation." As in the case at bar, the Defendants seized the property with knowledge and notice that their actions were illegal and that they were destroying the lawful rights of the owner (pg. 21 of 243 N.Y.).

The Court treated the question as one of constitutional law (pg. 26 of 243 N.Y.) and held that although the Complaint did not state a cause of action against the Park Commission "nor against the members thereof as such, it did state a cause of action against the individual defendants" members of the Commission.

The leading case of Litchfield v. Bond, 186 N.Y. 66, dealt with the State Engineer and his assistants who entered on private land, appropriated it and were held personally liable for damages proved.

These are but a very small sample of the numerous cases where high state officials have been held personally liable for damages for their ordinary torts. In the case at bar, we have an intentional tort, a ministerial act committed without any

authority whatsoever. In none of these cases was there any mention of the defense of "absolute immunity."

The Respondents herein never claimed "absolute immunity": They always claimed their acts were legal. However, on the Resondents' motion to dismiss the Complaint, the Court must treat the allegations of the malicious interference with Petitioners' employment and unlawful discharge as true.

The only public officer who have "absolute immunity" under the laws of the State of New York are members of the judiciary and to a somewhat lesser degree, officers acting in a quasi-judicial capacity. See Yates v. Lansing, 5 Johns. R. 282, 290 (N.Y. 1810). Pearson v. Ray, 386 U.S. 547 at 553-4. Also "Suits Against Government

and officers: Damage Actions," 77 Harvard Law Review, 209 at 219.

Petitioners again call the Court's attention to the statement by Judge Keating in Lombardo v. Stoke, 18 N.Y. 2d 394 at 402, 276 N.Y.S. 2d 97 at 103, in which eight of the nine Court of Appeals judges joined, that "absolute privilege should be sparingly extended" referring to cases of defamation.

However, any alleged "absolute immunity" must give way to Petitioners' pervasive constitutional right to his civil service position, particularly when that opposing right is grounded in the acts of State officers who have acted illegally

and beyond the scope of their official power and authority. Under the Civil Service law, before the permanent Civil Service Plaintiffs could be dismissed from his position, they were entitled to a written notice of the basis of and a hearing in connection with any such dismissal from the Civil Service (Civil Service Law §75.). This they never received. See Complaint, ¶7 (30).

Catone v. Hopkins
6 A.D. 2d 972, 176 NYS 2d 738 at 740.

Also directly in point is

McGraw v. Gresser
226 N.Y. 57

where the President of the Borough of Queens removed his executive clerk for political reasons without charges and without a hearing. It was held by the Court

that, although the civil service employee could have recovered his salary by mandamus, this did not bar the permanent civil service Plaintiff from recovering his salary from the Borough President personally.

What the Appellate Division has done here is to wipe out the constitutional rights of the Plaintiff Civil Service personnel by barring their cause of action with the case law thoery of absolute immunity. This is error. (See Matter of Seeley v. Stevens, 190 N.Y. 158 at 165.)

The remaining Petitioners are in the same legal position as the civil service personnel, particiularly since Ball v. State affirmed Chairman Ball's right to his salary as against the State. It would be unjust and inconsistent with Ball to hold that the other Commissioners and the

appointees of the Commission could not recover their salaries from the individual Respondents who/tortiously interferred with by the identical acts their rights to continued employment.

The State Courts have no authority to grant a State officer any immunity from a legal responsibility imposed by the supreme authority of the United States Constitution. See Scheuer at pg. 237 of 416 U.S.

CONCLUSION.

The Decision of the Appellate Division of the Supreme Court of the State of New York, Third Department, is palpably erroneous. It grants immunity to State officers who, up until the Third Department rendered its Decision, had no such immunity for probably 150 years (See Adsit v. Brady,

4 Hill (N.Y.) 631). The decision flies squarely into the face of Judge Keating's 1966 admonition in Lombardo v. Stoke, 18 N.Y. 2d at 402, 276 N.Y.S. 2d at 103 that "absolute privilege should be sparingly extended," even in cases of defamation, where immunity has been more liberally granted.

The present Petition for a writ of certiorari should be granted to resolve the conflict between the decision of the Appellate Division, Third Department, and the decisions of both this Court and prior decision of the New York Courts.

Dated: February 16, 1979

Ira M. Ball

Petitioner pro se and as
Attorney for Petitioners
Office and Post Office Address
298 Genesee Street
Utica, New York 13502
Phone No.: (315) 733-4282

VERIFICATION

STATE OF NEW YORK) ss.:
COUNTY OF ONEIDA)

Ira M. Ball, being duly sworn, deposes and says:

That deponent is one of the Petitioners herein and the attorney of record for said Petitioners in the within action.

That deponent has read the foregoing Petition for Writ of Certiorari and knows the contents thereof.

That the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponenet believes it to be true.

Ira M. Ball

Ira M. Ball

Subscribed and sworn to
before me this 16th day
of February, 1979.

Notary Public, Oneida County
My commission expires 3/30/79

Supreme Court, U. S.
FILED
FEB 22 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1404

IRA M. BALL, ET AL.,

Petitioners,

-vs-

HUGH L. CAREY, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF NEW YORK, ET AL.,

Respondents.

APPENDICIES TO
WRIT OF CERTIORARI.

IRA M. BALL, ESQ.
Attorney for Petitioners
298 GENESEE STREET
UTICA, NEW YORK 13502
PHONE NO.: (315) 733-4282

February 16, 1979

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OPINION OF THE APPELLATE DIVISION OF THE SUPREME COURT, THIRD DEPARTMENT, REPORTED AT 64 A.D. 2d 723, 407 N.Y.S. 2d 76.

IRA M. BALL, et al., Appellants,

v.

HUGH L. CAREY, as Governor of the State of New York, et al., Respondents.

Supreme Court, Appellate Division Third Department.

July 6, 1978.

Persons associated with State Bingo Control Commission brought action challenging effort by state officials to dismantle Commission and transfer its functions to the State Racing and Wagering Board. The Supreme Court, Special Term, Albany County, denied plaintiffs' motion for summary judgment and dismissed complaint, and plaintiffs appealed. The Supreme Court, Appellate Division, Third Department, held that: (1) Governor, Secretary of State, and director of budget were absolutely immune from liability for their allegedly tortious conduct in attempting to dismantle the State Bingo Control Commission, and state officials who acted at or under the direction of officials with absolute immunity were not liable, in absence of

allegations to suggest that any one or a combination of them independently effected the discontinuation of offices in the Commission, and (2) persons who were associated with the State Bingo Control Commission but who did not pay bingo license fees lacked standing to challenge constitutionality of such fee.

Affirmed.

Ira M. Ball, pro se.

Louis J. Lefkowitz, Atty. Gen. (William J. Kogan, Asst. Atty. Gen. of counsel), for respondents.

Before MAHONEY, P.J., and GREENBLOTT, KANE, MAIN and HERLIHY, JJ.

MEMORANDUM DECISION.

Appeals from orders of the Supreme Court at Special Term, entered April 19, May 24, May 27 and September 15, 1976 in Albany County, which, inter alia, denied plaintiff's motion for summary judgment and to add parties plaintiff and dismissed the complaint.

This action was commenced in November of 1975 by individuals associated with the New York State Bingo Control Commission to challenge what they perceived as illegal and unconstitutional efforts by various State officials to dismantle the

Commission and transfer its functions to the New York State Racing and Wagering Board. The factual background giving rise to this litigation and many of the legal theories propounded in connection with it need not be detailed for they are adequately set forth in decisions on a parallel suit in which one of the present plaintiffs secured a judgment against the State for unpaid salary (see Ball v. State of New York, 41 N.Y.2d 617, 394 N.Y.S.2d 597, 363 N.E.2d 323, affg. 52 A.D.2d 47, 382 N.Y.S.2d 835). Moreover, while the complaint initially requested several different types of relief, it is acknowledged that the subsequent legislative abolition of the Commission (L.1977, ch. 46) has mooted a number of those requests and rendered academic plaintiffs' appeals from certain intermediate orders. Nevertheless, plaintiffs assert that two of their original demands possess continuing viability and that, as to them, the order of Special Term denying summary judgment in their favor and dismissing the complaint was in error. They also maintain that Special Term improperly refused permission to add additional parties plaintiff to the action. We disagree and affirm its orders.

/1/ Plaintiffs claim entitlement to damages from the defendants individually in an amount equal to the salary and benefits they would have received had they not become separated from their respective positions with the Commission. Although judgment is not sought against the Comptroller or the President of the Civil Service Commission, it seems plain that many of the other defendants, such as the Governor, the Secretary of State and the Director of the Budget, would be absolutely immune from liability for the tortious conduct attributed to them (see Stukuls v. State of New York, 42 N.Y.2d 272, 397 N.Y.S.2d 740, 366 N.E.2d 829; James v. Board of Educ. of Cent. School Dist. No. 1 of Towns of Orangetown & Clarkstown, 37 N.Y.2d 891, 378 N.Y.S.2d 371, 340 N.E.2d 735). Whether the remaining defendants should be accorded this same or some lesser privilege need not be decided for it seems equally plain that, in relation to this matter, they merely acted at or under the direction of those who were absolutely immune and there are insufficient allegations to suggest that any one or a combination of them independently effected the discontinuation of plaintiffs' offices.

/2, 3/ Plaintiffs also seek a declaration that the bingo license fee represents an unconstitutional revenue tax. However, we again find it unnecessary to reach the merits of their arguments. Since plaintiffs do not pay such fees, they are not aggrieved by them and, thus, lacking standing to raise the issue. There is no impenetrable barrier to judicial review of this legislative scheme by those who are subject to these fees (cf. Boryszewski v. Brydges, 37 N.Y.2d 361, 364, 372 N.Y.S.2d 623, 625, 334 N.E.2d 579, 581) and plaintiffs' status as citizen taxpayers does not enhance their position for they are not attacking a "wrongful * * * disbursement of state funds" (State Finance Law, §123-b, subd. 1). Lastly, inasmuch as their complaint was to be dismissed, the addition of parties plaintiff who could separately protect their own interest was not indicated. We find no abuse of Special Term's discretion in its decision to refuse permission to add such parties and sufficient facts were not presented on the renewal of that motion to warrant an alteration of its former decision.

Orders entered May 27 and September 15, 1976 affirmed, with costs. Appeals from orders entered April 19 and May 24, 1976, dismissed as academic, with costs.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 17th day of April, 1978.

PRESENT: HON. A. FRANKLIN MAHONEY, Presiding Justice,
HON. LOUIS M. GREENBLOTT,
HON. T. PAUL KANE,
HON. ROBERT G. MAIN,
HON. J. CLARENCE HERLIHY, Associate Justices.

Same Title ORDER

The appellants having appealed from orders of the Supreme Court at Special Term entered April 19, 1976, May 24, 1976, May 27, 1976 and September 15, 1976 in the office of the Clerk of Albany County which, inter alia, denied the plaintiffs' motion for summary judgment

and to add parties plaintiff and which dismissed the complaint and said appeal having been heard during the above-stated Term of this Court, and Ira M. Ball, having appeared for the appellants, and Louis J. Lefkowitz, Attorney General of the State of New York (William J. Kogan, of Counsel) having appeared for the respondents, and the Court after due deliberation having rendered its decision on the 6th day of July, 1978, it is hereby

ORDERED that the orders entered on May 27, 1976 and September 15, 1976 so appealed from be and the same hereby are affirmed with costs, and it is further

ORDERED that the orders entered April 19, 1976 and May 24, 1976 be and the same hereby are dismissed as academic with costs.

E N T E R:

/s/ John J. O'Brien
Clerk

DATED AND ENTERED: July 10, 1978

A TRUE COPY

/s/ John J. O'Brien
Clerk

(seal)

State of New York
Supreme Court - County of Albany

Same Title JUDGMENT

The Appellants herein having appealed from orders of the Supreme Court at Special Term entered April 19, 1976 and May 24, 1976 in the office of the Clerk of Albany County which, inter alia, denied plaintiffs' motion for preliminary injunction and to renew, and the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department after due deliberation, having rendered a decision on the 6th day of July, 1978, ordering that the orders so appealed from be dismissed as academic, with costs, and an order having been entered so affirming, it is hereby

ADJUDGED, that the orders entered on April 19, 1976 and May 24, 1976 so appealed from be, and the same hereby are, dismissed as academic, with costs of $110.00 to the Respondents herein, and that the Respondents have execution thereon.

/s/ Guy A. Paquin
Clerk

DATED AND ENTERED:

(Certified Copy)

State of New York
Supreme Court--County of Albany

Same Title JUDGMENT

The appellants herein having appealed from the orders of the Supreme Court at Special Term entered May 27, 1976 and September 15, 1976 in the office of the Clerk of Albany County which inter alia, denied the plaintiffs' motion for summary judgment and to add parties plaintiff and dismissed the complaint, and the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department after due deliberation, having rendered a decision on the 6th day of July, 1978 ordering that the orders so appealed from be affirmed, with costs, and an order having been entered so af-

firmed, with costs, and an order having been entered so affirming, it is hereby

ADJUDGED, that the orders entered on May 27, 1976 and September 15, 1976, so appealed from be, and the same hereby are affirmed, with costs of $110.00 to the Respondents herein, and that the Respondents have execution thereon.

/s/ Guy A. Paquin
Clerk

DATED AND ENTERED:

(Certified Copy)

MEMORANDUM reported at 45 N.Y. 2d 837.

State of New York
Court of Appeals

Same Title

Motion to dismiss the appeal herein granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Twenty-sixth day of September A.D. 1978.

PRESENT, Hon. Charles D. Breitel, Chief Judge, presiding

Same Title

A motion having heretofore been made herein upon the part of the respondents to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no

substantial constitutional question is directly involved.

/s/ Donald M. Sheraw
Donald M. Sheraw
Deputy Clerk of the Court

MEMORANDUM

STATE OF NEW YORK
COURT OF APPEALS

Same Title

Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursements.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth day of December A.D. 1978

PRESENT, Hon. Charles D. Breitel,
Chief Judge, presiding.

Same Title

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the

appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

/s/ Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

(Certified Copy)

STATE OF NEW YORK
SUPREME COURT - COUNTY OF ALBANY

Same Title

JUDGMENT
Index No.
15351-75

The Petitioner-Appellant herein, having made a motion for leave to appeal to the Court of Appeals of the State of New York from an Order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of said Appellate Division on the 10th day of July, 1978, and the Court of Appeals, after due deliberation, having rendered a decision on the 6th day of December, 1978, ordering that the said motion be denied, with twenty dollars costs and necessary reproduction disbursements, and an order having been

entered so affirming it is hereby:

ADJUDGED, that the aforesaid motion be, and the same hereby is denied, with costs of $24.20 to Respondents, Hugh B. Carey, Individually and as Governor of the State of New York, et. al., and that the Respondents have execution thereon.

/s/ Mary Lindsay
Deputy Clerk

DATED AND ENTERED:

(Certified Copy)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

Same Title

Supreme Court, Albany County Special Term, January 9, 1976
Justice Edward S. Conway, presiding

CONWAY, J:

This is a motion by the defendants to dismiss the plaintiffs' complaint pursuant to Rule 3211(a)(2), (3), (5) and (7) CPLR upon the grounds that: (1) the Court lacks jurisdiction of the subject matter; (2) the plaintiffs lack standing to maintain the third cause of action; (3) the statute of limitations has expired; and (4) the complaint fails to state a cause of action.

The plaintiffs oppose the motion of the defendants and cross-move for summary judgment for the relief prayed for in the

complaint upon the ground that there are no triable issues of fact and there are no defenses to the cause of action asserted in the complaint.

The plaintiffs also seek in a subsequent proceeding to add as parties plaintiff certain charitable organizations in the State of New York who are holders of bingo licenses, and to amend the original complaint served on the defendants.

Plaintiff Ira M. Ball was appointed as a member and Chairman of the State Bingo Commission for a five-year term commencing June 1, 1974. Plaintiffs Freda, Pickney and Moskovit are members of the State Bingo Control Commission, and the remaining original plaintiffs are former employees of the Bingo Control Commission whose services were ter-

minated in April, 1975.

The Governor, in the 1975-76 Executive Budget submitted to the Legislature, recommended the abolition of the State Bingo Control Commission with the corresponding transfer of the functions of the Commission to the State Racing and Wagering Board. The State Purposes Budget (Chapter 50 of the Laws of 1975) was signed into Law on April 7, 1975 and carried out the recommendations of the Governor. No funds were appropriated in the Department of State for the Bingo Control Commission, and the Racing and Wagering Board received an appropriation of some $210,000 to regulate bingo. A bill was also introduced to repeal the sections of the Executive Law relating to establishment of the Bingo Control Commis-

sion. The bill passed the Assembly but failed of passage in the Senate. The services of plaintiff Ira M. Ball were terminated "based upon difficult fiscal circumstances" on April 8, 1975.

The plaintiffs first cause of action alleges that the State Purposes Budget of 1975 violates Article VII of the New York State Constitution and is ineffective insofar as it relates to any appropriation for the enforcement of the bingo laws and rules. The second cause of action alleges that defendants have usurped the rights and powers of the plaintiffs and all other incidents and privileges of their offices without any legal warrant or right. The third cause of action alleges that the license fees collected by the State for the

issuance of bingo licenses constitutes an unconstitutional tax upon charitable organizations. The fourth cause of action alleges that the Legislature has failed to make adequate appropriations for bingo regulations and that the plaintiffs were damaged by defendants alleged illegal actions which deprived plaintiffs of their Civil Service positions and loss of their salaries and benefits. The fifth cause of action alleges that defendants have conspired to exclude the plaintiffs from their offices and have taken all steps necessary to prevent the plaintiffs from exercising their rights to administer the rules and regulations of the Bingo Commission.

It is the contention of the defendants that the Budget does not violate the

provisions of Article VII of the Constitution and the four months' statute of limitations expired on August 8, 1975 (Budget was adopted April 7, 1975) and the lawsuit is therefore untimely. The defendants further content that the complaint fails in any event to state a cause of action and further, as to the third cause of action, the plaintiffs lack standing to challenge the constitutionality of the licensing fees. With these contentions this Court must agree.

The failure of the 1975 Legislature to repeal Section 433 of the Executive Law (which created the Bingo Commission) does not entitle plaintiffs to the relief sought in their complaint. Under Chapter 50 of the Laws of 1975, the Legislature appropriated additional funds to the

Racing and Wagering Board, thereby implementing the Governor's recommendation in this regard as set forth in the Executive Budget, and failed to appropriate funds for the Bingo Commission. Such appropriation, which served to abolish the Bingo Commission and transfer its licensing and supervisory functions to the Racing and Wagering Board, was a legitimate exercise of the Legislature's budgetary powers, even though the Legislature failed to repeal the statute abolishing the Bingo Commission.

This Court agrees with the decision of the learned Justice John T. Casey, dated March 23, 1976, denying a preliminary injunction in this proceeding wherein he stated:

"The issue presented is whether the Legislature in adopting the 1975 Budget evidenced an intent to abolish the New York State Bingo Control Commission. In my opinion, the specific language contained in the Program Budget Presentation recommending the abolition of the State Bingo Control Commission and the subsequent passage of the Budget by the Legislature evidences a sufficient direct action on the part of the Legislature to abolish the State Bingo Control Commission. The failure of the Legislature to pass the bill directly affecting the State Bingo Control Commission does not, in my view, negate the direct action by the Legislature. Church of the Ascension v. New York State Racing and Wagering Board, New York Law Journal, January 22, 1976, P. 8 Col. 2-3; c.f., Lorraine v. Carey, unpublished opinion of Hon. James Gibson dated April 22, 1975; contra, Ball v. State of New York, 83 Misc. 2d 903."

In view of the conclusion on the merits that the plaintiffs are not entitled to the relief sought by their complaint, it is unnecessary to further consider the

procedural questions raised. Suffice to say that plaintiffs did not possess the standing to raise the constitutionality of the licensing fees.

The motion of the defendants dismissing the complaint is granted, and the cross-motion of the plaintiffs for summary judgment is therefore denied, as is the subsequent motion to add parties plaintiff and amend the compliant.

Defendants to submit order.

At a Special Term of the Supreme Court of the State of New York, held at the Albany County Courthouse, Albany, New York on the 9th day of January, 1976.

P R E S E N T :
HONORABLE EDWARD S. CONWAY
Justice of the Supreme Court

Same Title

ORDER
Index No.
15351-75

Defendants having moved to dismiss the complaint, pursuant to CPLR, 3211(a)(2), (3), (5) and (7) upon the grounds that (1) the Court lacks jurisdiction of the subject matter; (2) the plaintiffs lack standing to maintain the third cause of action; (3) the Statute of Limitations has expired; and (4) the complaint fails to state a cause of action, and plaintiffs having cross-moved for summary judgment upon the grounds that there are no tri-

able issues of fact and no defenses to the cause of action asserted in the complaint, and plaintiffs also having moved to add additional parties plaintiff and to serve an amended complaint, now

UPON the summons dated November 21, 1975, the complaint, verified by Ira M. Ball, Esq. on November 20, 1975, the notice of motion to dismiss dated December 16, 1975, the affidavit of Kenneth J. Connolly, Esq., sworn to December 16, 1975, the notice of cross-motion dated December 30, 1975, the affidavit of Ira M. Ball, Esq., sworn to December 30, 1975, the reply affidavit of Ira M. Ball, Esq., sworn to December 10, 1975, the order to show cause on motion for joinder of additional parties, signed by Honorable Howard A. Zeller, Justice of the Supreme

Court, on February 23, 1976, the affidavit of Ira M. Ball, Esq., sworn to February 23, 1976, the affidavit of Rev. James Flanagan, sworn to February 17, 1976, the affidavit of Edythe Rosenblitt, sworn to February 13, 1976, the affidavit of Lynne Glatter, sworn to February 13, 1976, the affidavit of Rev. Robert O'Connor, sworn to February 27, 1976, the supplemental summons, dated February 23, 1976, the proposed amended complaint, verified by Ira M. Ball, Esq., on February 23, 1976, the affidavit in opposition of Kenneth J. Connolly, Esq., sworn to on February 26, 1976, the reply affidavit of Ira M. Ball, Esq., sworn to March 1, 1976, and upon all the papers and proceedings heretofore had herein, and after hearing Ira M.

Ball, Esq., attorney for plaintiffs, in opposition to the motion to dismiss and in support of the cross-motion for summary judgment and in support of the motion to add parties plaintiff and amend the complaint, and Louis J. Lefkowitz, Attorney General of the State of New York, Kenneth J. Connolly, Esq., of counsel, in support of the motion to dismiss and in opposition to the cross-motion for summary judgment and in opposition to the motion to add parties plaintiff and amend the complaint, and the Court having rendered a decision dated April 13, 1976, granting the motion to dismiss and denying the cross-motion for summary judgment and denying the motion to add parties plaintiff and amend the complaint, it is

ORDERED, that the defendants' motion

to dismiss the complaint is hereby granted and the complaint is hereby dismissed, and it is

FURTHER ORDERED, that plaintiffs' motion to add parties plaintiff and amend the complaint is hereby denied.

Dated: April 26, 1976
Albany, New York

/s/ Edward S. Conway
EDWARD S. CONWAY
Justice of the Supreme Court

Enter:

Clerk

At a Special Term of the Supreme Court of the State of New York held at Chambers at 99 Washington Avenue in the City of Albany on the 10th day of August, 1976.

P R E S E N T :
HONORABLE EDWARD S. CONWAY
Justice of the Supreme Court

Same Title

Order
Index No.
15351-75

Plaintiffs having moved for an order seeking leave to reargue and/or rehear and/or renew plaintiffs' motion for summary judgment and plaintiffs' motion to add parties plaintiff, now

UPON the order to show cause signed by the Honorable Edward S. Conway, Justice of the Supreme Court on July 1, 1976, the affidavit of Ira M. Ball, Esq., sworn to July 1, 1976, the affidavit of Kenneth J. Connolly, Esq., sworn to July 26, 1976, and upon all the papers and proceedings heretofore had

herein, and after hearing Ira M. Ball, Esq., attorney for plaintiffs, in support of the motion and Louis J. Lefkowitz, Attorney General, Kenneth J. Connolly, Esq., of counsel, attorney for defendants, in opposition thereto, it is

ORDERED, that the motion is, in all respects, denied.

DATED: Albany, New York

/s/ Edward S. Conway
Edward S. Conway
Justice of the Supreme Court

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

Same Title

(Supreme Court, Special Term, Albany County, December 11, 1975)
(Justice John T. Casey, Presiding)

M E M O R A N D U M

CASEY, J.

The plaintiffs have moved for a preliminary injunction enjoining the State Racing and Wagering Board of the State of New York from the following: (1) approving fair and reasonable maximum rent schedules to commercial lessors for bingo occasions to be held in 1976; (2) issuing bingo suppliers licenses for the year 1976; (3) from hearing any appeal from municipal determinations concerning bingo hearings and other matters; (4) exercising any other powers granted to the

State Bingo Control Commission under Section 435 (1) of the Executive Law; (5) compelling certain civil service employees who were transferred from the State Bingo Control Commission to the State Racing and Wagering Board from working out of title; (4) disbursing any funds appropriated to the State Racing and Wagering Board for bingo enforcement purposes.

The plaintiffs consist of the New York State Bingo Control Commission, the members of the Commission, and the employees and investigative staff of the Commission. The defendants are comprised in part of the Governor of the State of New York, the Secretary of State, the State Racing and Wagering Board, the Comptroller of the State, and the President of the State

Civil Service Commission.

Under Chapter 437 of the Laws of 1962 the State Bingo Control Commission was created within the Department of State. Executive Law, §433. The Commission being legislatively created, it may be abolished only by statute and a failure to appropriate salary for such a commission is insufficient action to abolish the commission. Matter of Sullivan v. Taylor, 279 N.Y. 364; Matter of Collins v. City of Schenectady, 256 App. Div. 389; Timpano v. Hanna, 77 Misc.2d 874, aff'd 44 App. Div.2d 912; see Friedman v. D'Antonio, 50 App. Div.2d 9.

In the Program Budget Presentation the Executive Department recommended the abolition of the State Bingo Control Commission and a transfer of the remain-

ing functions of that commission and certain monies for staff and related expenses to the State Racing and Wagering Board. The purpose of the recommendation was to consolidate in the State Racing and Wagering Board functions regulating games of chance. In addition, a specific budget bill was introduced in the Legislature, which, among other things, was designed to abolish the Bingo Control Commission. In the 1975 Budget there was no appropriation for the State Bingo Control Commission and there was an additional appropriation to the State Racing and Wagering Board. The specific bill abolishing the State Bingo Control Commission, however, passed the Assembly but did not pass the Senate.

The issue presented is whether the

Legislature in adopting the 1975 Budget evidenced an intent to abolish the New York State Bingo Control Commission. In my opinion, the specific language contained in the Program Budget Presentation recommending the abolition of the State Bingo Control Commission and the subsequent passage of the Budget by the Legislature evidences a sufficient direct action on the part of the Legislature to abolish the State Bingo Control Commission. The failure of the Legislature to pass the bill directly affecting the State Bingo Control Commission does not, in my view, negate the direct action by the Legislature. Church of the Ascension v. New York State Racing and Wagering Board, New York Law Journal, January 22, 1976, P. 8 Col. 2-3; c.f., Lorraine v. Carey, unpublished

opinion of Hon. James Gibson dated April 22, 1975; contra, Ball v. State of New York, 83 Misc.2d 903.

Motion for temporary injunction is denied. Submit order.

Dated: Troy, New York
March 23, 1976.

At a Special Term of the Supreme Court of the State of New York, held at the Albany County Court House, Albany, New York on the 11th day of December, 1975.

PRESENT:
HONORABLE JOHN T. CASEY
Justice of the Supreme Court

Same Title

ORDER
Index No.: 15351-75

Plaintiffs having moved for a preliminary injunction to enjoin the New York State Racing and Wagering Board from: (1) approving fair and reasonable maximum rent schedules to commercial lessors for bingo occasions to be held in 1976; (2) issuing bingo suppliers licenses for the year 1976; (3) from hearing any appeal from municipal determinations concerning bingo hearings and other matters; (4) exercising any other powers granted to the State Bingo Control Commission under Section 435(1) of the Executive Law; (5)

compelling certain civil service employees who were transferred from the State Bingo Control Commission to the State Racing and Wagering Board from working out of title; (6) disbursing any funds appropriated to the State Racing and Wagering Board for bingo enforcement purposes, now

UPON the Order to Show Cause signed by the Honorable Howard A. Zeller, Justice of the Supreme Court, on November 21, 1975, the Affidavit of Ira M. Ball, Esq., sworn to November 20, 1975, the Summons, dated November 21, 1975, the Complaint, verified by Ira M. Ball, Esq., on November 20, 1975, the Amended Order, signed by Honorable Howard A. Zeller, Justice of the Supreme Court, on December 2, 1975, the Affidavit of Ira M. Ball, Esq., sworn to December 1, 1975, the Affidavit of

Kenneth J. Connolly, Esq., sworn to December 8, 1975, the Reply Affidavit of Ira M. Ball, Esq., sworn to December 10, 1975, the Supplemental Affidavit of Ira M. Ball, Esq., sworn to December 15, 1975, the Affidavit of Ira M. Ball, Esq., sworn to November 28, 1975, and upon all the papers and proceedings heretofore had herein, and after hearing Ira M. Ball, Esq., attorney for plaintiffs, in support of the motion, and Louis J. Lefkowitz, Attorney General of the State of New York, Kenneth J. Connolly, Esq., of Counsel, in opposition thereto, and the Court having rendered a decision dated March 23, 1976, denying the motion, it is

ORDERED, that plaintiffs' motion for a preliminary injunction is hereby denied.

DATED: April 13, 1976
Troy, New York

/s/ John T. Casey
John T. Casey
Justice of the Supreme Court

ENTER:

At a Special Term of the Supreme Court of the State of New York, Part I, held in and for the County of Albany, at the County Court House at Albany, on the 11th day of December, 1975.

Present: Hon. John T. Casey, Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

Same Title

Index No. 15351-75

Order amending Order denying Preliminary Injunction

The plaintiffs having duly moved this Court for an Order granting a preliminary injunction pursuant to an Order to Show Cause dated November 21, 1975 and this Court having written a Memorandum dated March 23, 1976 denying the temporary injunction and the defendants having entered an Order denying the plaintiffs' motion for a preliminary injunction on April 13, 1976 which was entered in the Albany

County Clerk's Office on the 19th day of April, 1976;

AND plaintiffs having submitted an Order to Show Cause to this Court for leave to re-argue and/or renew their motion for a preliminary injunction together with a supporting affidavit of Ira M. Ball, sworn to on the 26th day of March, 1976;

AND this Court having notified said Ira M. Ball by letter dated March 29, 1976 that the "papers in support of the motion for re-argument do not convince me otherwise." and declined to sign said Order to Show Cause;

AND it appearing that the defendants' Order dated April 13, 1976 and entered in the Albany County Clerk's Office on the 19th day of April, 1976 should be and

hereby is amended to add the following paragraph:

"And it is further
ORDERED, that the Order herein signed April 13, 1976 and entered in the Albany County Clerk's Office on April 19, 1976 should be and hereby is amended by adding the following paragraph:

ORDERED, that the plaintiffs' motion for leave to re-argue and/or renew their motion for a preliminary injunction is denied."

/s/ John T. Casey
Justice of the Supreme Court

ENTER:

Signed at Troy, New York on
the 14 day of May, 1976

STATE OF NEW YORK
SUPREME COURT CHAMBERS
TROY, N.Y. 12180

March 29, 1976

Ira M. Ball, Esq.
Attorney at Law
298 Genesee Street
Utica, New York 13502

RE: Ball, et al v. Carey, et al

Dear Mr. Ball:

This court refuses to grant reargument in the above entitled matter.

All the points advanced by the petitioners have been considered by this court in its original decision. The papers in support of the motion for reargument do not convince me otherwise. The matter should be appealed.

The order to show cause is returned unsigned.

Very truly yours,

/s/ John T. Casey

John T. Casey
Supreme Court Justice

JTC:ewo
encs.

STATE OF NEW YORK
COURT OF APPEALS

Ira M. Ball, Respondent,

vs.

The State of New York, Appellant.

OPINION

GABRIELLI, J.:

In this case we must decide whether claimant, Chairman of the State Bingo Control Commission, is entitled to his salary for that office from April 1, 1975 to September 2, 1975. More precisely, the determinative issue is whether the Legislature in enacting the 1975-1976 budget (L 1975, c 50) abolished both the State Bingo Control Commission and claimant's office either by direct action or by implication in failing to expressly

appropriate funds for the commission or for claimant's salary. Both the Court of Claims and the Appellate Division have held that the Legislature had not taken the necessary action to abolish claimant's statutorily created position. We agree with the determination of the courts below.

Bingo had been legalized in New York State by a 1957 amendment to the New York State Constitution (see NY Const, art 1, §9(2)). The State Bingo Control Commission was created in 1962 to rigidly regulate the game of bingo in the State and prevent the infiltration of criminal and other undesirable elements into the game (see Executive Law, Article 19-B, §§430-439-b; General Municipal Law, Article 14-H, §§475-499; Report to Gov Rockefeller of Moreland Act Commission (March 1, 1962)).

Claimant has been the Chairman of the Commission since its creation. In June, 1974, he was reappointed to this position for a third five year term to expire in 1979, and his appointment was confirmed by the Senate. In his 1975-1976 Executive Budget, the Governor recommended the abolition of the Bingo Control Commission, and Budget Bill S3492/A4509 was introduced to effect that recommendation and transfer the functions of the commission to the State Wagering and Racing Board. The bill was passed by the Assembly but failed to win approval in the Senate and, thus, never became law. The 1975-1976 budget formally known as "State Purposes Appropriation Bill" (L 1975, c 50) was passed by the Legislature on March 26, 1975 and signed by the Governor on April 7, 1975. The

budget contained no provision relating to the abolition of the Bingo Control Commission or the transfer of its functions to the Racing and Wagering Board. Although no funds were specifically appropriated for the commission or for claimant's salary, the budget contained a lump sum appropriation for $399,200 under the title "Regulation of Wagering" earmarked for "Personal service - regular" (L 1975, c 50, p 240). A portion of these funds was presumably intended for the regula-

tion of bingo activities in the State.[1] Following the enactment of the budget bill, representatives of the Racing and Wagering Board proceeded to dismantle the

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[1] There is, of course, no claim that there has been any alteration of the comprehensive statutory scheme for the regulation, licensing and supervision of bingo contained in Articles 19-B of the Executive Law and 14-H of the General Municipal Law. Thus it remains the legislative policy in this State that "all phases of the supervision, licensing and regulation of bingo and the conduct of bingo games, should be closely controlled and that the laws and regulations pertaining thereto should be strictly construed and rigidly enforced" (Executive Law, §431; General Municipal Law, §475).

Albany and New York City offices of the Bingo Control Commission and purported to terminate its staff and transfer some of the positions to the Racing and Wagering Board. Former employees of the commission who had been transferred to the Board were instructed not to provide any information to claimant or perform any work for him. Nonetheless claimant continued to perform and execute his responsibilities as best he could. Claimant received no salary after April 1, 1975 and on April 9, 1975 claimant received a letter from the secretary to the Governor stating that his office was terminated. Claimant, filling a statutorily created office, replied that no action had been taken by the Legislature to abolish the commission and was informed in reply that

> "(w)hile you are correct in stating that final approval has not been given to the Budget Bill abolishing your agency * * * assurances have been given * * * that it will be passed by the Senate."

As previously noted, the bill was never enacted into law. On July 29, 1975 claimant filed his claim for salary due. His motion for summary judgment was granted in the amount of $14,966.57, representing his salary from April 1, 1975 to September 2, 1975, the date of the motion.

Events subsequent to the enactment of the 1975-1976 budget are of particular interest in this case. On August 6, 1975, the Governor approved a bill (L 1975, c 667, §16) which amended section 169 of the Executive Law by repealing a subdivision thereof and relettering

certain other subdivisions, without deleting a subdivision expressly setting forth the salary of the "chairman of the state bingo control commission" (see Executive Law, §169(j) as amended). The amendment became effective on August 6, 1975 but was made retroactive to April 1, 1975. It is also noteworthy that on January 20, 1976, the Governor submitted, in connection with the 1976-1977 budget, a new budget bill to abolish the Bingo Control Commission (S 7298/A 9268). The bill was identical to that which failed to win legislative approval in 1975 except that it contained the following provision:

> "All appropriations made to the State Bingo Control Commission pursuant to Section 1 of Chapter 50 of the Laws of 1975, to the extent of remaining unexpended balances, are hereby transferred and made available for use by the State Racing and Wagering Board."

This bill died in committee and thus met the same fate as the 1975 bill seeking to abolish the Bingo Control Commission.

It is axiomatic that the Legislature may abolish or shorten the term of positions which it has created (see eg, Lanza v. Wagner, 11 NY 2d 317, 324; Nichols v. MacLean, 101 NY 526, 533; Matter of Friedman v. D'Antoni, 50 AD 2d 9, 10-11). Thus, in the early case of Nichols v. MacLean (supra, p 533), it was held that "(t)he Legislature may abolish an office during the term of an incumbent or diminish the salary or change the mode of compensation, subject only to Constitutional restrictions." It is clear in this case that the Legislature took no express action to abolish the Bingo Control Commission or the office of chairman of that

agency. Thus, the issue presented is essentially one of legislative action and intent; may it be inferred from the enactment of the 1975-1976 budget without explicit appropriation of funds for claimant's salary that the Legislature expressly or impliedly repealed the office of chairman of the Bingo Control Commission?

Article 19-B of the Executive Law creates the Bingo Control Commission and specifies its purpose and function. Section 433 (subd (1)) of the Executive Law establishes the position of chairman of the commission, and subdivision (5) thereof provides that "(t)he chairman shall receive compensation fixed by the governor within the amount made available by appropriation therefor."

Subsequent to the adoption of the latter statute, section 169 of the Executive Law (as amended) was approved by the Governor and became effective on August 6, 1975, but, by its terms, was made retroactive to April 1, 1975. That section fixes the chairman's salary, providing that:

> "The annual salaries of the officers holding the positions indicated hereinbelow shall be as follows:
>
> * * *
>
> (j) * * * chairman of the state bingo control commission * * *, $35,350."

As we have already point out, the initial Executive Budget included a bill which would "transfer responsibility for the regulation and control of bingo from the Department of State" to the Racing and Wagering Board by abolishing

the Bingo Commission but this bill failed to win legislative approval. Nowhere in the 1975-1976 budget as enacted by the Legislature is there any provision for the elimination of the Bingo Control Commission or the transfer of its activities. While there is no specific appropriation of funds for the Commission or claimant's salary, there is a lump sum appropriation for the regulation of wagering. This Court has held that in some instances the failure to make appropriation for the salary of one appointed to a statutorily created office may not operate to deprive the office holder of his salary (O'Neil v State of New York, 223 NY 40, 44; see also, Matter of Collins v City of Schenectady, 256 App Div 389, 391). By its failure to pass the

legislation explicitly accomplishing the result sought by the Governor, or to specifically provide in the budget as finally enacted for the abolition of the bingo commission, the Legislature may be deemed to have expressed an intent not to eliminate the commission or the office of chairman. The Governor's reintroduction of the bill eliminating the Bingo Control Commission in 1976 quite obviously seems to indicate his own understanding that the Legislature had not, by the mere enactment of the 1975-1976 budget, repealed the applicable sections of the Executive Law.

The doctrine of repeal by implication is heavily disfavored in the law and may be resorted to only in the clearest of cases (Cimo v State of New York, 306 NY

143, 148; City of New York v Matbie, 274 NY 90, 97; see also, Matter of Corning v Donohue, 29 NY 2d 209, 215; McKinney's Statutes, §391; cf Brooklyn Union Gas Co v New York State Human Rights Appeal Board, ___ NY2d ___, decd Dec. 20, 1976). The rule has been neatly stated that "such repeals (by implication) will not be discovered unless the conclusion is unavoidable, as when repugnancy between the two statutes is plain" (Cimo v State of New York, supra, p 148). Moreover, the general rule "'applies with peculiar force to statutes enacted at the same session of the Legislature'" (County of Saratoga v Saratoga Harness Racing Assn, 4 NY 2d 622, 627, quoting from Board of Education v Roger, 278 NY 66, 71). The Legislature which

enacted the 1975-1976 budget also amended section 169 of the Executive Law without deleting from that statute the express provision for claimant's salary. We may not conclude, therefore, that the budget operates as a repeal by implication of sections 433 and 169(j) of the Executive Law since the Legislature itself appears to have recognized that the provision for claimant's salary in section 169(j) remains an enactment of continuing legal validity in the state (see McKinney's Statutes, §376). In sum, the budget bill is a general statute which establishes a lump sum appropriation for the regulation of wagering; it does not supersede the specific, detailed statutory provisions creating the bingo control commission and its operations.

We turn now to appellant's contentions that the enactment of the budget was sufficient to repeal the applicable sections of the Executive Law upon which claimant bases his claim for salary. On this appeal, the State advances the argument that section 44(2) of the State Finance Law should be construed to require that the budget must provide a specific appropriation for a public officer's salary. That statute provides:

> "Any appropriations for salary, compensation or expenses shall be the salary, compensation or expenses for one year of the officer, employee, office, board, department, commission or bureaus for whom or which the same is appropriated, notwithstanding existing provisions of any other statute fixing the annual salary, compensation or expenses of such officer or employee * * * at a different amount."

This section is operative only in the situation in which an actual budgetary

appropriation for salary differs from the salary specificed in a statute. In such a case section 44(2) provides that the amount of the appropriation is the controlling amount of salary. It does not operate to deprive a public officer of his salary where the budget makes no specific appropriation for salary but only contains a general lump sum provision for "Personal service". In fact, it appears that not only did the 1975-1976 budget make no specific appropriation for the salary of the chairman of the Bingo Control Commission but there are also no specific salary appropriations for any other public officials (except for certain members of the Alcoholic Beverage Control Board in New York City, see L 1975, c 50, p 20). Indeed, the budget merely contains lump sum

provisions for "Personal service" under the various departmental headings; it cannot be seriously maintained that by virtue of section 44(2) of the State Finance Law, the vast majority of public officials of the State are not entitled to any salaries.

Appellant also relies on the "Joint Legislative Report of the Senate Finance and Assembly Ways and Means Committee on Actions Taken on the 1975-1976 Executive Budget" as a "precise declaration of Legislative intent" to abolish the Bingo Control Commission and claimant's position. The report merely indicates the recommendation of the joint committee and obviously is not itself an expression of legislative intent especially in light of the failure of the bill specifically abolishing the commission to win approval. However, an examination

of the portion of the report dealing with regulation of wagering contains no discussion relating to the elimination of the commission. The report (p 85) recites that four non-statutory positions in the Racing and Wagering Board are abolished, that fourteen Bingo Investigator positions transferred from the Department of State are abolished, and that a position, Director of Division of Bingo, in the Racing and Wagering Board is approved "to design and clarify" the state's regulatory activities with respect to bingo. There is a conspicuous absence of any language relating to the elimination of claimant's position or the Bingo Commission itself. The same reasoning applies with regard to a memorandum from the Deputy Comptroller. The memorandum is dated March 31, 1975 and

prior, of course, to the adjournment of the Legislature on July 12, 1975 without having passed any legislation designed to abolish the Bingo Commission. The memorandum itself noted that substantive legislation abolishing some agencies had not yet been enacted. Obviously, in the face of the failure of such legislation to win final approval, the initialling of the memorandum by the committee chairman may not serve as evidence of legislative intent.

Finally, appellant places considerable reliance on our recent decision in Matter of Blyn v. Bartlett (39 NY 2d 349), which involved the question whether the Administrative Board of the Judicial Conference could validly abolish the positions of confidential attendant in the Supreme Court and law secretary in the Civil Court of

the City of New York. Our decision in the case was predicated upon the conclusion that section 222 of the Judiciary Law vested the Administrative Board with the power to abolish such positions despite the provision in section 166 of the Judiciary Law that Supreme Court Justices shall appoint law assistants. We held that "Article 7-A of the Judiciary Law is infused with the idea of centralized control and authority and in section 222 the power to appoint personal assistants is made expressly subject to such control" (supra, pp 360-361). In the instant case, respondent's position is not statutorily conditioned upon the review or approval of any administrative body.

We conclude by emphasizing that this case in not resolved by recourse to the truisms

that "(t)he courts do not sit in judgment of legislative policy * * * " (Gaynor v. Rockefeller, 15 NY 2d 120, 134) and that the province of the Courts does not extend to the wisdom, necessity or motivation of legislation (see Kittinger v. Buffalo Traction Co, 160 NY 377, 388, 389). Reliance on these basic jurisprudential principles may not compensate for the absence of required legislative action. The policies of the Executive Branch in budgetary matters are subject to the approval of the Legislature (NY Const, Art 7, §§2, 3, 4) and only the Legislature may repeal a validly enacted statute. Under the circumstances presented here we cannot conclude that the Legislature has manifested a clear intent to repeal the existing statutory authority establishing the Bingo Con-

trol Commission. In making this determination we do not abdicate our judicial role in derogation of legislative authority. Rather, we only apply the constitutional dictate that the legislative power of the state is vested in the Senate and Assembly (NY Const, Art 3, §1). "Thus reads the fundamental law binding on us all, Judiciary, Governor and Legislature" (People v. Tremaine, 281 NY 1, 11).

Accordingly, the order of the Appellate Division should be affirmed without costs. The Court has denied costs because of the excessive length of respondent's brief (see, e.g., Slater v. Gallman, 38 NY 2d 1; see also Rochester City School District v. Rochester Teachers' Association, ___NY 2d___, decided herewith).

* * * * * * * * *

Order affirmed, without costs. Opinion by Gabrielli, J. All concur

Decided April 7, 1977

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

IRA M. BALL,

Respondent-Appellant.

-against-

STATE OF NEW YORK,

Appellant-Respondents.

(Claim No. 59498.)

Argued, February 2, 1976.

SWEENEY, J.

Claimant was appointed Chairman of the New York State Bingo Control Commission in June of 1962 when the Commission was established and has continued to serve in that position ever since via subsequent 5-year appointment. His present term expires June 1, 1979.

In the 1975 Executive Budget the Governor recommended abolition of the Bingo Commission and transfer of the regulation and control of bingo to the State Racing and Wagering Board. A bill implementing this recommendation passed only one house of the Legislature. The 1975-76 State budget provided no funds for the Bingo Commission (L. 1975, ch. 50). There was, on the other hand, an appropriation to the State Racing and Wagering Board for "Regulation of Wagering"

for "Personal service -- regular", an amount which represented an increase of some $236,000 over such appropriation in the 1974-75 State budget.

Since April 1, 1975, claimant has received no salary or expense payments. The offices of the Bingo Commission have been dismantled and, although claimant performed services for the Commission as best he could from April 1, 1975 to July 16, 1975, he ceased performing such services when Bingo personnel were ordered by the Racing and Wagering Board personnel not to perform services for claimant, nor to give him any information. Claimant filed a claim in the Court of Claims on July 29, 1975, seeking salary and expenses from April 1, 1975 to the date of filing of said claim. Claimant's motion for summary judgment to the extent that he is entitled to the appropriate amount of his unpaid salary, plus interest, was thereafter granted.

On this appeal claimant has withdrawn his cross-appeal. The State first contends that the Court of Claims lacked jurisdiction to determine the claim in the absence of a judgment of the Supreme Court reinstating claimant to his position as Chairman of the State Bingo Commission. We disagree. Claimant's removal was not accomplished by a body or officer against whom an article 78 proceeding would lie. Nor would an article 78 proceeding in the nature of mandamus

to compel the comptroller to pay claimant's salary be effective. The comptroller cannot audit a claim for salary unless an appropriation applicable thereto has been made. (State Finance Law, § 43.) Where the comptroller has refused to audit a claim for salary because no money has been appropriated, the Court of Claims should determine such claim. (O'Neil v. State of New York, 223 N.Y. 40.) Since it is alleged that the State owes claimant money, the Court of Claims has jurisdiction of the subject matter and it is the only forum in which the State has consented to be sued. (Friedman v. State of New York, 24 N.Y.2d 528, 536.)

The central issue on this appeal is whether claimant's position was abolished by the Legislature upon the enactment of the 1975-76 State budget bill (L. 1975, ch. 50). Claimant's position was statutorily created and his term of office, salary and duties statutorily prescribed. (Executive Law, art. 19-B; §169 subd. j.) The abolishment of such a position may be accomplished only by direct action of the Legislature. (Matter of Friedman v. D'Antoni, 50 A.D. 2d 9, app. dsmd. ___ N.Y.2d ___ (Mar. 30, 1976).) The State urges that the passage of Chapter 50 of the Laws of 1975 constituted such direct action by the Legislature and claimant's position was thereby effectively abolished. It points to the Executive Budget, a joint report by the Senate Finance Committee and the Assembly Ways & Means Committee and to

circumstances surrounding the enactment of such budget bill to demonstrate the required legislative intent to abolish claimant's position. Claimant, on the other hand, asserts that since there was a failure to pass legislation specifically designed to abolish his position, it was not abolished. We agree. We do not find the direct legislative action necessary to abolish claimant's position in the enactment of the 1975-76 State budget, nor would a repeal by implication of article 19-B of the Executive Law by such statute because of failure to appropriate funds for claimant's salary, constitute such direct action.

While the appropriations set forth in the 1975-76 budget were determined on the basis of the Governor's recommendations in his Executive Budget and no appropriation was included therein for the Bingo Commission, the State cannot deprive claimant of the salary for his fixed-term position as prescribed by the Executive Law by refusing to appropriate funds therefor. The Legislature must abolish such a statutorily fixed-term position by a legislative act which specifically provides therefor and states in explicit language that such is the intent. In the case before us we are not dealing with the abolition of positions in the civil service and the transfer of functions of agencies where no funds had been appropriated by the Legislature, as was the case in Matter of

Lorraine v. Carey (Misc 2d), relied on by the State. (Cf. People ex rel. Davison v. Williams, 213 N.Y. 130.) The case of Church of the Ascension and Church of the Holy Name of Jesus, v. New York State Racing and Wagering Board (N.Y.L.J. January 22, 1976, p. 8, col. 2) is not inconsistent. There the court held that Chapter 50 of the Laws of 1975 effectively implemented the Governor's recommendation to abolish the Bingo Commission and transfer its functions to the Racing Board. There was no issue in that case concerning the abolition of the position of the Chairman of the Bingo Commission which was statutorily created for a definite term of years.

The judgment should be affirmed, with costs.

HERLIHY, J. (concurring).

I agree with the conclusion of the majority that the direct legislative action necessary to abolish the claimant's position is not established by the facts and circumstances of this case. I do not agree, however, with the assertion that a repeal by implication of article 19-B of the Executive Law would not also abolish the claimant's position and preclude his right to recover unpaid salary. The sole right of claimant to his salary would be his appointment for a five-year term and the repeal of

article 19-B would necessarily shorten his term to the time already served by direct action of the Legislature. For the following reasons, I have concluded that the legislative action involved in this case did not repeal section 433 of the Executive Law.

The general rule as to repeal by implication is that "Repeals of earlier statutes by implication are not favored and a statute is not deemed repealed by a later one unless the two are in such conflict that both cannot be given effect." (McKinney's Cons. Law. of N.Y., Book 1, Statutes, § 391; Matter of Corning v. Donohue, 29 N.Y. 2d 209. 215.) "The absence of an express provision in a later statute, for repeal of an earlier one, gives rise to a presumption that repeal was not intended (citation omitted). If by any fair construction, both statutes can be given operation, implied repeal will not be declared * * * a more general statute * * * will not repeal a more specific one * * * unless there be patent inconsistency and the two cannot stand together, so that the Legislature is clearly shown to have intended such a result (citations omitted)". (Cimo v. State of New York, 306 N.Y. 143, 148, 149; see, also, People v. Mann, 31 N.Y. 2d 253, 258.)

"(T)he primary and fundamental question to be resolved is what did the Legislature intend." (People v. Mann, supra, p. 257.)

Upon its face the budget bill does not purport to repeal any of the provisions

of article 19-B. The appropriation for "personal service - regular" for the State Racing and Wagering Board was a lump sum in 1975 and the appropriation for the Department of State was in the same form. Pursuant to the provisions of article 7 of the Constitution it appears that in connection with the budget bill, the Legislature could have repealed article 19-B or specifically abolished any personnel provisions therein as being related to the appropriation requested and granted. Unlike other legislation, the budget bill for the Executive Department becomes law immediately upon its passage by the Legislature and without approval by the Governor. In connection with the budget, the Governor did submit specific legislation abolishing the Bingo Commission and transferring its powers to the Racing and Wagering Board as well as repealing sections 433 and 439-b of the Executive Law. The Legislature did not pass that legislation.

The joint report of the finance committees recites that the proposed transfer of 14 Bingo Investigator positions is denied and/or abolished and a new position "Director of Division of Bingo" was approved. The report said his duties were to "design and clarify the State's regulatory activities related to Bingo Control and Local Enforcement responsibilities". The report, however, does not recite that the Bingo Commission was to be abolished or that

any particular Bingo Commission powers were to be transferred to the Racing and Wagering Board. The report states "In reading the narrative it should be noted that all agency programs may not be listed."

The legislative action in the present case does not establish any clear intent on its part to abolish the Bingo Commission. Section 433 is a special or specific statute and the budget bill is a general statute. It is entirely possible to transfer certain functions to the Racing and Wagering Board without abolishing the commission. Indeed, the new Director of Division of Bingo in the Racing and Wagering Board was merely directed to design and clarify regulatory activities by the Joint Report. This could be a service to the Bingo Commission even though he is placed in the Racing and Wagering Board. Section 434 of the Executive Law provides for assistance to the Bingo Commission from other agencies or departments.

The conclusion that the Legislature had no specific intent to abolish the Bingo Commission and in particular the claimant's position as fixed in section 433 of the Executive Law has further support by later action of the same Legislature. In August of 1975 Chapter 667 of the Laws of 1975 was approved and became law, retroactive to April 1, 1975, and section 16 thereof repealed subdivision (e) of section 169 of the Executive Law and relettered the subdivision which recites

the title of "chairman of state bingo control commission" without striking that title from the statute. By implication, the legislative intent as expressed in August of 1975 and retroactive to April 1, 1975 was that the claimant's position was not abolished.

The specific legislation introduced in the Legislature did not pass in the Senate and, therefore, did not become law. On the record it is impossible to conclude that the passage of the Budget Bill, by implication, abolished the claimant's position.

The judgment appealed from should be affirmed.

MAHONEY, J. (concurring in part and dissenting in part).

We concur with that portion of the majority's decision that holds that the Court of Claims had jurisdiction of the subject matter and was the proper forum for litigation of the issue before us.

We dissent from the substantive holding by the majority that enactment of the 1975-76 State Budget Bill did not abolish claimant's position as Chairman of the New York State Bingo Control Commission.

The specificity required by the majority, i.e., the passage of the budget bill

implementing the Governor's intention, evidenced by the 1975 Executive Budget, of abolishing the position of Chairman of the New York State Bingo Control Commission, in our view, places the emphasis on form rather than substance. The 1975-76 Budget Bill (L. 1975, ch. 50) is no less a statute than the bill specifically mentioning the subject position by title would have been had it been enacted.

Although a position legislatively created may be abolished only by statute (Matter of Sullivan v. Taylor, 279 N.Y. 364) and a failure to appropriate a salary for such a position is insufficient action to accomplish that end (Matter of Collins v. City of Schenectady, 256 App. Div. 389; Timpano v. Hanna, 77 Misc 2d 874, affd. 44 A D 2d 912), a statute, such as the 1975-76 budget, which in addition to eliminating the salary for the subject position also evidences an intent to abolish the position itself by transferring all of the duties heretofore discharged by the Bingo Control Commission Chairman to the State Racing and Wagering Board, qualifies as the "direct action" by the Legislature requisite to the abolishment of the postiion statutorily created (Friedman v. D'Antoni, 50 A D 2d 9, app. dsmd. ___ N Y 2d ___). Further evidence that such was the legislative intent can be gleaned from Exhibit F attached to the answering affidavit of claimant wherein both the Senate Finance Committee and the

Assembly Ways and Means Committee, by initialling a memorandum from the Deputy Comptroller, affirmatively stated that it was legislatively intended "that the functions, powers and duties of the public officials * * * were * * * transferred to the departments and agencies receiving the appropriation." Clearly, it appears that the Governor intended and requested that the subject position be abolished and that the appropriate committees of the Legislature acquiesced in the Governor's recommendation by recommending for passage the 1975-76 budget which, in fact, transferred all the functions, powers and duties of the Bingo Chairman to the State Racing and Wagering Board.

Since, in our view, the intention of the Legislature to abolish the subject position is clear, it is unnecessary to withhold approval of the legislative design merely because the statute could have been expressed more clearly. It is well-settled that "(I)t is the duty of courts to adopt a construction of a statute that will bring it into harmony with legislative intent, and no narrow construction of a statute may thwart the legislative design." (McKinney's Cons. Law of N.Y., Book 1, Statutes, § 92). In Matter of River Brand Rice Mills, Inc. v. Latrobe Brewing Co. (305 N.Y. 36), the court stated:

> The intent of the Legislature in enacting legislation is the primary ojbect to be found. Whenever such

intention is apparent it must be followed in construing the statute * * * " case within the intention of a statute is within the statute, though an exact literal construction would exclude it." (305 N.Y. 36, 43; see, also, Matter of Wilson v. Board of Educ., Union Free School Dist. No. 23, Town of Oyster Bay, 39 A D 2d 965, mod. 32 N Y 2d 636; Community School Bd. Dist. 3 of School Dist. of City of N.Y. v. Board of Educ. of School Dist. of City of N.Y., 66 Misc 2d 739, affd. 38 A D 2d 932.)

In People ex rel. Wood v. Lacombe (99 N.Y. 43), the Court of Appeals stated:

> In the interpretation of statutes, the great principle which is to control is the intention of the legislature in passing the same, which intention is to be ascertained from the cause or necessity of making the statute as well as other circumstances. A strict and literal interpretation is not always to be adhered to, and where the case is brought within the intention of the makers of the statute, it is within the statute, although by a techincal interpretation it is not within its letter. (99 N.Y. 43, 49.)

Therefore, since the 1975-76 budget (L. 1975, ch. 50) not only eliminates any appropriation for the subject position,

but also eliminates any appropriation for the Commission over which claimant had heretofore presided and, further, transfers all retained employees and the monies for their salaries to another department and directs that department discharge all the functions and duties heretofore delegated to the Bingo Commission, the legislative intent is abundantly clear. That legislative intent must be recognized by this court for any judicial construction to the contrary would be an iimpermissible interference with the functions of one branch of government by another.

The judgment should be reversed.

STATE OF NEW YORK
COURT OF APPEALS

Church of the Ascension & ano.,
Respondents,
vs.
New York State Racing and Wagering Board, et al.,
Appellants,
Elinor Guggenheimer, Commission of New York City Department of Consumer Affairs,
Respondent,
and Belfran Industries,
Appellant.

MEMORANDUM

MEMORANDUM:

The order of the Appellate Division should be affirmed, without costs.

Both the determination of the Bingo Control Commission granting respondents leave to file notices of appeal nunc pro tunc and the determination of the Racing and Wagering Board vacating that order were made while the Bingo Control Commission

was vested with the authority to regulate the game of Bingo. The State Purposes Appropriation Bill (L 1975, ch 50) neither abolished the Bingo Control Commission, nor transferred its authority to the Racing and Wagering Board. (Cf., Ball v. State of New York, 41 NY2d 617, 625.) Accordingly, the Racing and Wagering Board had no authority to vacate the order of the Bingo Control Commission granting respondents leave to file notices of appeal nunc pro tunc. We note, however, as did the Appellate Division, that inasmuch as the propriety of the order of the Bingo Control Commission is not before us on this appeal, we express no opinion on this issue.

* * * * * * *

Order affirmed, without costs, in a memorandum. All concur.

Decided December 20, 1978

BALL et al . v. CAREY, et al.
BALL AFFIRMATION, ¶"First", pgs. 3-5, 9

First: Said Plaintiffs were wrongfully dismissed from their positions as investigators (mainly) for the State Bingo Control Commission by the Respondents without any statutory or other legal authority and in violation of Article 5, §6 of the New York State Constitution and its implementing statute, the Civil Service Law. All of the Defendants-Respondents are sued as individuals insofar as the allegations of wrongful discharge and malicious interference with Plaintiffs' employment are concerned.

A. Said Article 5, §6 of the Constitution has been interpreted by the Court of Appeals as giving "at least something like permanency of tenure to appointees in

the civil service, and above all to put an end to the vicious practice which had grown up out of changing employees whenever the appointing power was changed without any cause except the unrestrained will of the person who happened for the time being to be at the head of the department." Matter of Seeley v. Stevens, 190 N.Y. 158, 163.

> "If the legislature should repeal all the (Civil Service) statutes and regulations on the subject of appointments in the civil service, the mandate of the Constitution would still remain, and would so far execute itself as to require the courts, in a proper case, to pronounce appointments made without compliance with its requirements illegal. (People ex rel. McClelland v. Roberts, 148 N.Y. 360, 366.)"
>
> Wipfler v. Klebes
> 284 N.Y. 248 at 254.

B. The constitutional question now presented to this Court is:

Can a judicially declared rule of law

("absolute immunity" established by case law) overcome the constitutional property right that the Plaintiff civil service personnel have to their permanent positions? Where a statute conflicts with constitutional provisions, the statute must fall. See McKinney's Statutes, §150. Certainly a statute is of higher quality than case law* such as "absolutely immunity" of public officers and employees established by the Appellate Division for the first time on the appeal to that Court. Therefore, the case law rule of "absolute immunity" must bow before the ever

* See: In re Brown's Ex'n, 130 Misc. 865, 226 NYS 1 at 22, mod. other grounds, 225 A.D. 759, 232 NYS 371 cited in 86 C.J.S., Statutes §2, Nature of Statutes, no. 70.

present provisions of Article 5, §6 of the State Constitution. See quote Valz v. Sheepshead etc. at p. 21, infra.

In discussing a similar problem which involved a statute enacted by the Legislature, the Court of Appeals wrote in People v. Hawkins, 157 N.Y. 1 at 7-8:

> "The citizen cannot be deprived of his property without due process of law. The principle embodied in this constitutional guaranty is not limited to the physical taking of property. Any law which annihilates its value, restricts its use, or takes away any of its essential attributes, comes within the purview of this limitation upon legislative power. The validity of all such laws is to be tested by the purpose of their enactment upon property. A law which interferes with property by depriving the owner of the profitable and free use of it, or hampers him in the application of it for the purpose of trade or commerce, or imposes conditions upon the right to hold or sell it, may seriously impair its value, against which the Constitution is a protection.

* * *

"The guaranty against depriving the citizen of his liberty comprehends much more than the exemption of his person from all unlawful restraint. It includes the right to engage in any lawful business, and to exercise his faculties in all lawful ways in any lawful trade, profession or vocation. All laws, therefore, which impair or trammel these rights, or impose arbitrary conditions upon his right to earn a living in the pursuit of a lawful business are infringements upon his fundamental rights of liberty, which are under constitutional protection." (Emphasis supplied.)

If the foregoing applies to statutory law, a fortiori it must apply to judicially established case law.

* * *."

Supreme Court, U. S.
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(J-39)

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1404

IRA M. BALL, ET AL.,

Petitioners,

—against—

HUGH L. CAREY, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF NEW YORK, ET AL.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING CERTIORARI

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In The

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OCTOBER TERM, 1978

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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING CERTIORARI

Statement

The respondents submit this brief in opposition to the petitioners' application for certiorari to review the decision and order of the Appellate Division of the Supreme Court, Third Department, of the State of New York which unanimously affirmed two orders of the Supreme Court at Special Term which, *inter alia*, dismissed the complaint in this action by which plaintiffs challenged as illegal and unconstitutional the action of the defendant State officials in terminating the operation of the New York State Bingo Control Commission and transferring its functions to the New York State Racing and Wagering Board.

Subsequent to the affirmance by the Appellate Division, the Court of Appeals of the State of New York, on September 26, 1978, granted the respondents' motion to dismiss the petitioners' appeal to that Court which had been taken as of right "upon the ground that no substantial constitutional question is directly involved." On December 6, 1978 the Court

of Appeals denied petitioners' motion for leave to appeal to that Court.

Question Presented

Does the instant application, arising from the abolition of a State agency and the termination of certain of its officers and employees, present any substantial issue warranting review by this Court?

Respondents contend that the lack of merit in petitioners' application is demonstrated by the actions of the New York State Court of Appeals and the memorandum decision of the Appellate Division.

Facts

Petitioners Ball, Freda, Pickney and Murkovit were members of the New York State Bingo Control Commission (hereafter, the Commission) at the time of the adoption of the New York State Budget on April 1, 1975. The remaining petitioners were employees of the Commission.

The Executive Budget for fiscal year 1975-76 recommended abolition of the Commission together with a transfer of its function to the New York State Racing and Wagering Board (hereafter, the Board). The budget contained no recommended appropriation for bingo control activities in the Commission but did recommend an appropriation of $361,000 to the Board for the regulation of bingo.

The State Purposes Budget for fiscal year 1975-76 (Laws of 1975, chap. 50) was signed by Governor Carey on April 7, 1975. The budget did not appropriate funds to the Department of State, of which the Commission had been part, for the regulation of bingo activities. However, the Board received an appropriation of $210,000 to regulate bingo and that agency did in fact proceed to regulate bingo in New York State. Petitioners' services were terminated in April, 1975 as a result of this transfer of function.

This suit was commenced on or about November 24, 1975. The petitioners originally sought declaratory relief, injunctive relief and monetary damages for back salary. The request for injunctive relief (reinstatement to employment) was thereafter abandoned when chapter 46 of the Laws of 1977 (effective April 1, 1977) was enacted specifically providing for abolishment of the Commission and the office of Chairman of the Commission.* Petitioners continued to seek money damages and a declaration as to the validity of the State bingo license fee.

The opinion of the Appellate Division, Third Judicial Department (*Ball* v *Carey*, 64 AD2d 723, 407 NYS2d 76) held that many of the named respondents "would by absolutely immune from liability" (had the complaint stated a cause of action in tort) and the remaining respondents "acted at or under the direction of those who were absolutely immune and there are insufficient allegations to suggest that any one or a combination of them independently effected the discontinuance of plaintiffs' office."

The Appellate Division did not reach the merits of the challenge to the bingo license fee finding that the petitioners did not pay the fee and thus lacked standing to raise a legal challenge thereto.

The petitioners' appeal to the New York Court of Appeals was dismissed "upon the ground that no substantial constitutional question is directly involved" (45 NY2d 837) and petitioners' motion for leave to appeal was likewise denied (NY2d , 12/6/78).

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*In *Ball* v *State*, 41 NY2d 617, the Court of Appeals held that the State purposes budget for 1975-76 did not abolish the Commission or the office of Chairman thereof because specific statutory authority creating same had not been repealed. Such was not the case for the remaining petitioners herein.

ARGUMENT

THE INSTANT APPLICATION PRESENTS NO SIGNIFICANT FEDERAL ISSUES OR QUESTIONS OF CONSTITUTIONAL DIMENSION FOR REVIEW BY THIS COURT.

The main thrust of this action when commenced was to obtain reinstatement to positions which the petitioners contended had not been properly abolished. Any infirmity* which may have existed and any rights which petitioners may have had to return to their positions ended when the New York State Legislature enacted chapter 46 of the Laws of 1977 (effective April 1, 1977). The petitioners conceded this, as they must, for it is well within the power of the sovereign to streamline government and terminate positions as a result of fiscal exigencies (see, e.g., *Farrell* v *Carey*, 62 AD2d 583, app dsmd 45 NY2d 832, cert den US [Feb., 1979]; *Matter of Saur* v *Director of Creedmoor Psychiatric Center*, 41 NY2d 1023 [1977]; *Matter of Blyn* v *Bartlett*, 39 NY2d 349 [1976]).

The petitioners who were Commission members attempted to construct an equal protection argument, but the patent absence of invidious discrimination (e.g., *Dandridge* v *Williams*, 397 US 471 [1970]) and the general lack of merit is obvious to the most cursory inspection and was reflected in the decisions in the New York State Courts.

The remainder of petitioners' action dealt with a challenge to the State imposed bingo license fee and an attempt to impose tort liability upon the respondents. The license fees allegedly violated State law in that the revenues exceeded the cost of the program. The New York Courts properly

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*Under New York State law public offices created by statute may not be abolished by the mere absence of a budgetary appropriation therefor (*Ball* v *State*, 41 NY2d 617 [1977]) but positions in the civil service of the State may be abolished by the absence of an appropriation (*Matter of Buffalo P.B.A. Inc.* v *Makowski*, 56 AD2d 732 [4th Dept, 1977]; *Jones* v *Carey*, 55 AD2d 260 [3d Dept, 1976]).

held, it is submitted, that since the petitioners were not themselves licensees they lacked legal standing to raise this issue. With regard to possible tort liability on the part of the respondents, the New York Courts properly found, it is submitted, that the factual allegations of the complaint were insufficient, and that, in any event, the respondents' immunity under New York law would bar recovery for the tortious conduct attributed to them (*Stukuls* v *State of New York*, 42 NY2d 272).

CONCLUSION

PETITIONERS' APPLICATION FOR CERTIORARI SHOULD BE DENIED.

Dated: March 20, 1979

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1404

IRA M. BALL, ET AL.,

Petitioners,

-vs-

HUGH L. CAREY, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF NEW YORK, ET AL.,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

IRA M. BALL, ET AL.,

Petitioners,

-vs-

HUGH L. CAREY, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF NEW YORK, ET AL.,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Ira M. Ball, one of the Petitioners herein, submits the following in reply to the "BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING CERTIORARI," dated March 20, 1979.

On pg. 2 thereof, second full paragraph under the title "Facts," Respondents state:

"The budget contained no recommended appropriations for bingo control activities in the Commission but did recommend an appropriation of $361,000 to the Board for the regulation of bingo."

But, Judge Gabrielli writing for a unanimous Court of Appeals in Ball v. State (Appendix D at pgs. 4 and 5), specifically found that:

"Although no funds were specifically appropriated for the (Bingo) Commission or for claimant's (Chairman Ball's) salary, the budget contained a lump sum appropriation for $399,200 under the title 'Regulation of Wagering' earmarked for 'Personal services - regular' (L 1975, c 50, p 240). A portion of these funds was presumably intended for the regulation of bingo activities in the State." (Emphasis supplied.)

Judge Gabrielli corroborated the foregoing at pg. 8, Appendix D, as follows:

"It is also noteworthy that on January 20, 1976, the Governor submitted, in connection with the 1976-1977 budget, a new budget bill to abolish the Bingo Control Commission (S 7298/A 9268). The bill was identical to that which failed to win legislative approval in 1975 except that it contained the following provision:

'All appropriations made to the State Bingo Control Commission pursuant to Section 1 of Chapter 50 of the Laws of 1975, to the extent of remaining unexpended balances, are hereby transferred and made available for use by the State Racing and Wagering Board.'" (Emphasis supplied.)

This proves that Respondents' statement quoted at the top of pg. 2, supra, is not true and that the Legislature did make an appropriation in 1975 to the Bingo Commission for regulation of bingo.

At pgs. 12 and 13 of Appendix D, Judge Gabrielli held that, by the failure of the 1975 Legislature to pass the budget bills abolishing the Commission, it "may be deemed to have expressed an intent not to eliminate the Commission or the office of Chairman." (Emphasis supplied.)

Further, Judge Gabrielli found that Respondent Governor Carey, by "reintroduction of the bill eliminating the Bingo Control

Commission in 1976 quite obviously seemed to indicate his own understanding that the Legislature had not, by the mere enactment of the 1975-76 budget, repealed the applicable sections of the Executive Law." (Pg. 13 of Appendix D.)

The foregoing discussion by Judge Gabrielli not only proves that the Respondents have misrepresented to this Court the alleged appropriation to the Racing and Wagering Board of $210,000 but, by stating that the Racing and Wagering Board "did in fact proceed to regulate bingo in New York State," is an admission by Respondents that they caused the illegal usurpation of the Petitioners' offices and position.

At pg. 4 of Appendix D, Judge Gabrielli also found that there had been

no "transfer of function" from the Bingo Commission to the Racing and Wagering Board as claimed by Respondents at the bottom of pg. 2 of their Brief:

> "The budget contained no provision relating to the abolition of the Bingo Control Commission or the transfer of its functions to the Racing and Wagering Board." (Emphasis supplied.)

The Respondents herein are bound by the findings of the Court of Appeals in Ball v. State under the theory of collateral or judicial estoppel. See 5 New York Civil Practice, Weinstein-Korn-Miller, ¶¶5011:23, et seq., particularly 5011:27, and "The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings," 59 Harvard Law Review 1132.

In the footnote at the bottom of pg. 3 of Respondents' Brief, they maintain that

although the Chairmanship and the Commission itself were not abolished as to the Claimant Ball in Ball v. State, "Such was not the case for the remaining petitioners herein." This is a ridiculous argument. If the Commission was not abolished as to Ball, it was not abolished as to any and all of the remaining Petitioners.

REPLY TO RESPONDENTS' "ARGUMENT"

On pgs. 4 and 5 of Respondents' Brief, under the title "Argument," Respondents attempt to raise questions of fact which is not permissible, particularly where the certiorari questions arise out of a motion to dismiss a complaint where all of the allegations of the complaint must be accepted as true.

A good example is Respondents' statement that "it is well within the power of the sovereign to streamline government and

terminate positions as a result of fiscal exigencies." (Citing cases.) There is absolutely no proof in the record of any "fiscal exigencies" with regard to bingo operations. As a matter of fact, the evidence is just to the contrary as alleged in the "THIRD CAUSE OF ACTION" of Petitioners' complaint, printed at pgs. 44-47 of the Record on Appeal to the Appellate Division, Third Department, a copy of which is in the hands of the Court.

Respondents herein attempted to raise the very same argument for the first time upon their appeal to the Court of Appeals in Ball v. State and the attempt failed. The matter was briefed in POINT IX of the Claimant Ball's Brief to the Court of Appeals (copy filed with the Court). The Attorney General in his Brief to the Court of Appeals cited two of the three cases

he now cites at the end of the first paragraph on pg. 4 of his Brief herein, viz: Matter of Saur v. Director of Creedmoor Psychiatric Center and Matter of Blyn v. Bartlett. Judge Gabrielli denied the application of said cases to the situation in Ball v. State. See Appendix D, pgs. 20-21. Therefore, this argument is also barred as a matter of "collateral estoppel" or "judicial estoppel," referred to at pg. 5, supra.

As a matter of fact, all of the cases cited in the first paragraph and the footnote on pg. 4 of Respondents' Brief are not in point since they relate to situations where money was appropriated by the Legislature in a lump sum to a department or agency of the State. It has been held that the department or agency head then has discretion to abolish positions under his control since he has the responsibility

of living within the lump sum appropriation made by the Legislature and the question then becomes one of the abuse of discretion by the agency head. This situation is explained very well in Goodman v. State, 37 A.D. 2d 703, 322 N.Y.S. 2d 858 at 859-860.

That is not the situation in the case at bar. Neither the Chairman of the Commission (Ball) nor the remaining Commissioners were ever given an opportunity to "use the (reduced) resources of their (his) Department as to provide the maximum of services and facilities required by law to be furnished." Petitioners allege in par. 7 of their Complaint (Pg. 30 of the Record on Appeal to the Appellate Division, Third Department) that:

> "The Plaintiffs never resigned, or abandoned or forfeited their public offices, positions and employment, nor have they been removed or displaced by the judgment of any court

nor have any charges been brought against them. That the Commission never abolished or discharged any of the Plaintiffs referred to in pars. '4' and '5' above." (Emphasis supplied.)

Their power was usurped by the Respondents herein as alleged in par. 20 of Complaint.*

In the footnote at the bottom of pg. 4 of Respondents' Brief, the Attorney General states:

> "* * * but positions in civil service of the State may be abolished by the absence of an appropriation (citing cases.)."

This statement is at best a half truth. The Attorney General himself set forth the correct law in his letter dated May 21, 1976 to the New York State Division of the Budget, headed by the Respondent Peter Goldmark, printed in full at pgs. 274 and 275 of the Record on Appeal to the Appellate Division, Third Department, copy filed with this Court, where he stated as follows:

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* Pg. 37, Appellate Division Record on Appeal.

> "It is now well established that an employee holding permanent status in the classified service may be suspended as the result of abolition of positions for reasons of economy provided only that the abolitions are necessary and made in good faith (Civil Service Law, §§80, 80-a; Matter of Schwab v. Bowen, 80 Misc. 2d 763, affd. 51 A.D. 2d 574 (2d Dept., 1976); Matter of Felder v. Fullen, 27 NYS 2d 699, affd. 263 App. Div. 986, affd. 289 N.Y. 658 (1942); Mtr. of Danker v. Dept. of Health, 153 Misc. 502, affd. 242 App. Div. 765 (1st Dept., 1935); Matter of Brizzolara v. McKenzie, 166 Misc. 282 (Sup. Ct., N.Y. Co., 1938); Matter of Reilly v. Smith, 92 Misc. 309 (Sup. Ct., N.Y. Co., 1915)). See also DeLury v. City of New York, 48 A.D. 2d 595, 601 (1st Dept., 1975), citing with approval the reasoning in Matter of Schwab v. Bowen, (supra)."

The question of "good faith" is discussed at pgs. 19-21 and 42-56 of the Petition for Certiorari herein.

Both the Buffalo P.B.A. and the Jones cases Respondents cite rest upon proof of good faith---a factor totally missing in the case at bar.

The Court will note that in addition to the "good faith" requirement, the Attorney General states that abolitions must be necessary for economy purposes. This involves the third question presented in the Petition at pgs. 9-10 and discussed at pg. 64 thereof where Petitioners raised the issue of converting the bingo licensing fees "into an 'unconstitutional revenue tax' (excise tax)."

The question was raised in the Petitioners' "THIRD CAUSE OF ACTION" at pgs. 44-47 of the Record on Appeal to the Appellate Division, Third Department. The question is discussed in depth under POINT II B under the title of "DEFENDANT-RESPONDENTS MISREPRESENTED TO THE LEGISLATURE THE UNAVAILABILITY OF FUNDS TO OPERATE THE BINGO CONTROL COMMISSION.", at pgs. 43-50 of the "BRIEF OF APPELLANTS-RESPONDENTS" submitted to the Appellate

Division, Third Department, copy filed with the Court.

However, the entire picture is succintly set forth at pg. 276 of the aforesaid Record on Appeal in a letter from the Director of State Accounts to the Petitioner Ball, attesting to the fact that although in 1975-76 the State of New York received total bingo licensing fees of $1,203,422.50, it only spent $162,492.57 for bingo administration, less than 14 percent. These were licensing fees imposed under the State's police power and constitutionally must be first used to support the operations of the State Bingo Control Commission. Instead they were diverted into the general fund.

Finally, Respondents' statement in the last sentence on pg. 5 of their Brief that "* * * the New York Courts properly found, it is submitted, that the factual allegations of the complaint were insufficient, * * *.", is completely in error since any such holding by Special Term was made prior to the Court of Appeals' decision in Ball v. State. Special Term specifically cited Ball v. State as being "contra." See Appendix B, pg. 8 and Appendix C, pg. 6. If any inference is to be drawn from the affirmance of Ball v. State by the Court of Appeals, it is that the Petitioners have a good cause of action based on the tort liability of Respondents.

CONCLUSION

PETITIONERS' APPLICATION FOR CERTIORARI SHOULD BE GRANTED.

Dated: April 5, 1979

Respectfully submitted,

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